TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 748

FORD MOTOR COMPANY, PETITIONER,

vs.

TOM L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1939.

CERTIORARI GRANTED APRIL 3, 1939.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1939.

[fols. a-1] [Captions omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

At Law. No. 1409

FORD MOTOR COMPANY

vs.

R. B. STANFORD, Secretary of State, et al.

FIRST AMENDED ORIGINAL PETITION—Filed July 12, 1937

Leave of Court being first had and obtained, comes now plaintiff, Ford Motor Company, and files this, its First Amended Original Petition, in lieu of its Original Petition as Amended heretofore filed herein, and complaining of Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, shows to the Court as follows:

I

This is a suit at law of a civil nature. The matter in controversy herein exceeds Three thousand Dollars ($3,000), exclusive of interest and costs. The plaintiff Ford Motor Company is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Delaware, and is a citizen of the State of Delaware. The defendants, and each of them, are citizens of the State of Texas. This court has jurisdiction because there is a diversity of citizenship between the parties hereto, and in that the amount in controversy is in excess of $3,000, exclusive of interest and costs.

[fol. 3] II

Plaintiff, Ford Motor Company, is as aforesaid a corporation duly created, organized and existing under and by virtue of the laws of Delaware, having its principal office

and place of business in the State of Michigan, City of Dearborn, County of Wayne.

The defendant, Edward Clark, is now the duly appointed, qualified and acting Secretary of State of the State of Texas, and has been substituted as defendant herein in lieu of R. B. Stanford, resigned, formerly the duly appointed, qualified and acting Secretary of State of the State of Texas. The defendant Charley Lockhart is now, and at all times material hereto has been, the duly elected, qualified and acting State Treasurer of the State of Texas. The defendant William McCraw is now, and at all times material hereto has been, the duly elected, qualified and acting Attorney General of the State of Texas. Said defendants, and each of them, are resident citizens of Travis County, Texas, and have heretofore entered their appearances and filed their answers herein.

III

This is a suit pursuant to the provisions of the Acts of the 43rd Legislature of the State of Texas, Chapter 214, page 637, known as the Suspension Statutes, for the recovery of taxes illegally assessed and paid the State of Texas under protest and to enforce the rights extended plaintiff as taxpayer under the terms and provisions of said Acts of the 43d Legislature, Chapter 214, known as and hereinafter referred to as the Suspension Statutes.

[fol. 4]

IV

Long prior to the occurrence of the matters hereinafter set out and complained of, plaintiff legally and lawfully obtained from the State of Texas a permit as a foreign corporation to transact business within the State of Texas. At all times material hereto said permit was in full force and effect and so remains in full force and effect; and plaintiff was and is duly authorized to transact its business within the State of Texas having, as aforesaid, duly qualified thereto, pursuant to the statutes of the State of Texas in said cases made and provided.

V

In addition to the requirements of the State of Texas for the obtaining by foreign corporations of a permit to transact business within the State of Texas, the statutes of

the State of Texas, to-wit, Articles 7084 and 7085, Revised Civil Statutes of the State of Texas of 1925, as amended by the Acts of the 42nd Legislature, Chapter 265, page 441, provide that a foreign corporation such as plaintiff, authorized to do business in Texas, shall on or before May 1st of each year pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of its outstanding capital stock, surplus and undivided profits plus the amount of outstanding bonds, notes and debentures other than those maturing less than a year from the date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax should be computed at the following rates: for each $1000 or fractional part thereof; One to One Million Dollars, 60¢; in excess of One Million Dollars, 30¢; provided that such tax shall not be less than Ten Dollars. Said statutes as amended provide that foreign corporations such as plaintiff who have done [fol. 5] business in Texas for as much as a year prior to the date upon which such tax becomes payable, shall pay the tax based upon computations from the data contained in the reports required by Articles 7087 and 7089, Revised Civil Statutes of Texas of 1925.

VI

Said statutes as amended provide substantially for the filing of a report to the Secretary of State between January 1st and March 15th of each year by foreign corporations such as plaintiff on blanks furnished by the Secretary of State showing the condition of the corporation on the last day of its preceding fiscal year. Such statutes provide that the Secretary of State may extend the time for filing such report for good cause shown to any date up to May 1st.

VII

The reports required by said Articles require information showing the cash value of all gross assets of the corporation, the amount of its authorized capital stock, the capital stock actually subscribed, and the amount paid in, the surplus and undivided profits or deficits, if any, the amount of mortgage, bonded and current indebtedness, the amount and date of payment of the last annual, semi-annual, quarterly or monthly dividend, the amount of all

taxes paid and duly payable separately to the State of Texas and political subdivisions thereof, the total gross receipts of the corporation from all sources and the gross receipts from business done in Texas for the fiscal year preceding, with detailed balance sheet and income and profit and loss statement in such form as the Secretary of State may prescribe.

VIII

Article 7091, Revised Civil Statutes of the State of Texas of 1925, provides for a penalty of 25% for failure to pay [fol. 6] said franchise tax promptly when due, and that for a failure to pay same on or before the first day of July after same becomes due the corporation shall forfeit its right to do business in the State, forfeiture to be accomplished without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to the corporation the words "Right to do business forfeited" and the date of such forfeiture

IX

The principal business of plaintiff Ford Motor Company is that of a manufacturer and vendor of automobiles and self-propelled vehicles and parts therefor.

X

The fiscal year of plaintiff corporation ends with the calendar year on December 31st of each year.

XI

Plaintiff transacted business in the State of Texas during the whole of its fiscal year 1935 which ended December 31, 1935, and ever since said time up to and including the date of filing of this petition has continued so to transact its business and intends and expects in the future so to do.

In brief, plaintiff's Texas business is conducted in the following way: Plaintiff owns and operates within the State of Texas assembly plants. No parts for the self-propelled motor vehicles sold by plaintiff are manufactured at said assembly plant or at any other point within the State of Texas. All of said parts are manufactured at plants outside of the State of Texas, located for the most

part in the State of Michigan. The manufactured parts are shipped from Michigan and other points outside of the State of Texas to plaintiff's assembly plants in Texas, and [fol. 7] are there assembled or put together into finished, self-propelled motor vehicles. The assembled vehicles are then sold in intrastate commerce to various dealers, who in turn sell said vehicles to the public. Some of the vehicles assembled at the Texas plants are sold in interstate commerce, but by far the biggest part thereof is sold, as aforesaid, to Texas dealers in intrastate commerce.

During the year 1935 approximately 60,000 motor vehicles were assembled by plaintiff at its assembly plants in Texas in the manner outlined above. In some few instances completed motor vehicles are shipped into Texas from points outside this State and sold in intrastate commerce. During the year 1935 approximately 700 such units were thus sold in Texas. In addition thereto, Ford Motor Company annually ships into Texas and sells to its various dealers in intrastate commerce many thousands of dollars worth of motor vehicles and tractor parts and accessories, all of which are manufactured without the State of Texas, for the most part, in the State of Michigan.

XII

Prior to March 15, 1936, R. B. Stanford, formerly Secretary of State, and formerly a defendant herein, for good cause shown, granted plaintiff an extension of time for the filing of the reports required by Articles 7087 and 7089, as amended, so as to permit the filing of same within the time same were actually filed as hereinafter alleged. Said report so required by said articles for the purpose of computing the franchise tax of plaintiff for the taxable year May 1, 1936 through April 30, 1937, was actually filed within the extended time granted by the Secretary of State, and prior to May 1, 1936. Said report was in all things in compliance with the terms and provisions of said Articles 7087 and 7089, as amended, and the requirements of the Secretary of State of the State of Texas.

[fol. 8] Said reports showed, among other things, that the gross receipts of plaintiff for the fiscal year ended 1935, from business done in Texas, were $34,272,887.72; that the gross receipts of plaintiff for the fiscal year ended December 31, 1935, from business done outside of Texas were

$854,072,087.75, and that the total gross receipts of plaintiff for the fiscal year ended December 31, 1935, from all business done, both in and out of Texas, and its interstate business, amounted to $888,344,975.47. According to said report the percentage of all of plaintiff's business for the fiscal year ended December 31, 1935, done in Texas was 3.8580606%.

Said report showed total capital at December 31, 1935, of $600,242,151.57. Said report claimed total taxable Texas capital at only $3,079,417.96. Accompanying said report was a certified check in all things in compliance with the requirements of the Secretary of State in favor of the Secretary of State for $1224, which was tendered by plaintiff in payment of its franchise taxes for the taxable year beginning May 1, 1936.

XIII

The facts shown by said report were in all things true and correct, except that as hereinafter alleged the amount of total taxable capital allocated to Texas in said report was in excess of the capital or true value thereof, and the actual and true value of the total of plaintiff's capital devoted to its Texas business.

XIV

When said report and said check in payment of franchise taxes were filed with the Secretary of State, plaintiff filed contemporaneously therewith a letter addressed to the Secretary of State, pointing out that plaintiff had used the value of property in the State of Texas as the total taxable capital instead of allocating capital stock and surplus, and [fol. 9] stating that this was done because of the fact that the allocating method results in a taxable value greatly in excess of the actual taxable value in the State of Texas.

XV

Under date of May 5, 1936, R. B. Stanford, then Secretary of State, and formerly a defendant herein, addressed a letter to plaintiff acknowledging receipt of plaintiff's letter of April 28th and of plaintiff's franchise tax report for the year beginning May 1, 1936, and as well of plaintiff's remittance in the amount of $1224, tendered to cover franchise taxes due by plaintiff as computed by it. In said letter, but

without questioning the correctness of plaintiff's figures and of plaintiff's report in respect to the amount of capital actually devoted to its Texas business, the Secretary of State refused to accept said tender of $1224 as in full of plaintiff's franchise taxes for the taxable year and demanded of plaintiff an additional sum of $6023.40 plus a 25% penalty of $1505.85 for failure to pay the full amount of said franchise tax before May 1, 1936. In said letter the former defendant Secretary of State demanded from plaintiff the payment of said additional amount of taxes and the penalty thereon of 25% under pain of avoiding a forfeiture of plaintiff's right to do business in Texas.

XVI

Under date of May 29, 1936, the former defendant Secretary of State forwarded plaintiff a delinquent franchise tax notice demanding payment from plaintiff of an additional sum of $7,529.25 over and above the $1224 theretofore paid by plaintiff to represent franchise taxes and penalties for the year beginning May 1, 1936, and advised plaintiff was due the State of Texas said sum of $7529.25, and that unless [fol. 10] same was paid on or before July 1st next plaintiff's right to do business would be forfeited without judicial ascertainment, and that the account would be certified to the Attorney General and the State Tax Board for suit for collection.

XVII

Under duress of said demands from the Secretary of State which, as hereinafter alleged, were wholly illegal and without warrant of law, and on June 29, 1936, plaintiff made payment to the Secretary of State of said additional sums so demanded of it by the Secretary of State, but filed with the Secretary of State simultaneously and in connection with said payment its letter of protest dated June 23, 1936. Said letter was addressed to the Secretary of State and signed by plaintiff by its Secretary and Assistant Treasurer, B. J. Craig. Said letter was a letter of protest setting out fully and in detail each and every ground or reason why it was contended as by said letter it was contended that the demand of the Secretary of State was unlawful and unauthorized, all as is provided for in the Acts of the 43rd Legislature, Chapter 214, page 637.

XVIII

In said letter of protest it was recited that plaintiff had theretofore filed on the forms required a franchise tax return as of December 31, 1935, for the purpose of determining and paying franchise taxes due by plaintiff for the year beginning May 1, 1936. Said letter adverted to the fact that in said franchise tax return the total of all of plaintiff's outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures other than those maturing in less than a year from date of issue, amounted to $600,242,151.57, as well as to the fact that said return showed the total gross receipts for the year [fo' 11] ended December 31, 1935, in respect to business done in Texas and in respect to business done outside of Texas, the business done in Texas being $34,272,887.72, or 3.8580606 per cent of the total of all business done by plaintiff, which latter item amounted to $888,344,975.47. Said letter further adverted to the requirement of the Secretary of State that plaintiff's franchise tax for the year beginning May 1, 1936, be computed upon that proportion of plaintiff's outstanding capital stock, surplus and outstanding profits, etc., as the gross receipts of the Texas business bears to the total gross receipts, and that on such basis of ascertainment of the tax the defendant, the former Secretary of State, demanded a total tax without penalties of $7247.40. Said letter further adverted to the fact that plaintiff in its franchise tax report showed its total taxable capital as $3,079,417.96, so that the franchise tax based thereon would be $1224. Said letter recited that the payment of the additional amount for franchise tax and penalties was made only because plaintiff desired to avoid forfeiture of its right to do business in Texas which would follow upon plaintiff's non-payment of said amount, and said letter further stated that the additional amount demanded by the Secretary of State was paid under protest pursuant to the provisions of Chapter 214 of the Acts of the 43rd Legislature of the State of Texas, and in said letter of protest plaintiff claimed such additioinal tax and penalty to be unlawful and illegal and not properly due and owing by plaintiff, and said letter advised as well of the intention of plaintiff to bring this suit against the former defendant Stanford, formerly Secretary of State, defendant Charley Lockhart, State Treasurer, and defendant. William Mc-

Craw, Attorney General of the State of Texas, for the recovery of said additional tax and penalty as provided for in said Chapter 214 of the Acts of the 43rd Legislature. The basis of illegality of said additional tax and penalties therefor were assigned as follows:

[fol. 12] "We are a corporation organized under the laws of the State of Delaware, with our principal office, however, in the State of Michigan. Our principal business is the manufacture and sale of automobiles and parts therefor, our principal manufacturing plant being located in Michigan, in which State we maintain our principal office from which we direct all of our activities and at which we keep our principal corporate records. We are engaged in the sale and distribution of automobiles and parts therefor in interstate commerce and in commerce between the United States and foreign nations, by far the greater part of our sales being in interstate and foreign commerce, and only a small amount of such sales being in intrastate business in the State of Texas. In fact, the gross receipts from our business done in Texas during the year 1935 was only slightly more than 3.85% of the gross receipts from our entire business. In addition we have large investments in stocks or (of) corporations organized and operating in foreign countries, and own large amounts of bonds, mortgages, notes, United States securities, municipal and state securities and miscellaneous investments, none of which are used, held or located in the State of Texas.

Attached hereto as Exhibit A is a detailed analysis of our assets and capital and surplus, which will be self-explanatory and which is referred to here as if copied in full at this point. The first column gives the net book value of our total assets, the second column gives the value of our capital and surplus representing our total assets (being the net book value of our assets less our liabilities); the third column represents the portion of the capital and surplus allocated [fol. 13] to the State of Texas under formula set forth in Article 7084 of the Revised Statutes of Texas, and being the amount allocated by you to Texas for the purpose of computing the franchise tax; the fourth column represents the net book value of our assets allocated to Texas under said formula, being 3.8580606% of the net book value of our total assets; the fifth column sets forth the actual net book value of our actual assets in the State of Texas; the sixth column

shows the amount of 'capital stock, surplus and undivided profits' representing the actual assets in the State of Texas; and the seventh column represents the excess of the portion of our capital and surplus allocated to Texas by you and by said formula over the capital and surplus representing the assets actually situated in the State of Texas.

From this it will be seen that you, by following the said formula, have attributed to Texas $23,157,705.95 of our capital and surplus, when the actual net book value of all of our assets in Texas is only $3,079,417.96, which figure also is more than the actual value of said assets. The sum of $1224 which we have heretofore paid you is the amount of our franchise tax computed on said figure of $3,079,417.96, whereas the lawful amount of said franchise tax was and is an amount not more than $1,113.90 which is computed at the rates prescribed by the statutes of Texas applied to the amount of $2,712,048.50 (as shown by Column 6 of Exhibit A attached hereto) which is the value of the 'capital stock, surplus and undivided profits' of this company which represents the said assets actually situated in the State of Texas of the net book value of $3,079,417.96. On the other hand, you have computed our franchise tax and have demanded [fol. 14] payment of the same on the basis of $23,157,705.95 of our capital and surplus allocated by you and by said formula to the State of Texas, an amount more than seven times the value of all of our assets located in Texas, and more than eight times the value of the 'capital stock, surplus and undivided profits' representing said assets in Texas.

Under the circumstances, the requirement that we pay said additional tax is the creation by the State of Texas of an arbitrary and unreasonable burden upon our interstate and foreign commerce in violation of the provisions of Article I, Section 8 of the Constitution of the United States vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several states, and likewise deprives us of our property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person of his property without due process of law, in that said additional franchise tax demanded is a tax upon property of ours neither located nor used within the State of Texas and is a tax upon our business transacted outside of the State of Texas. In view of said Section 8 of Article I

of the United States Constitution and of said Fourteenth Amendment thereto, neither you nor the State of Texas has any lawful right to demand or require that we pay said additional amount of franchise tax and penalty.

We are paying said additional tax and penalty, however, under protest and compulsion and only because of the provisions of Article 7091 of the Revised Statutes of Texas, 1925, as amended, providing for the forfeiture of our right [fol. 15] to do business if said additional tax and penalty are not paid on or before July 1st and of your letter of May 5, and State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for Account No. 2941, advising that said additional tax and penalty must be paid on or before said date in order for us to avoid the incurring of said forfeiture.'"

XIX

Attached hereto is a true and correct copy of said letter of protest in haec verba and of Exhibit A attached thereto. Said letter and said Exhibit A are denominated Exhibits C and D, respectively, to this petition.

XX

In this connection, plaintiff alleges that the facts, figures and amounts shown by said Exhibit A attached to said letter of protest of June 23, 1936, are true and correct, and the facts, figures and amounts set out in said Exhibit A and said letter of protest are here adopted and alleged as fully as if set out herein in haec verba, although plaintiff here specifically alleges briefly the following in respect to its condition as of the end of its fiscal year 1935: The net book value of its total assets wherever located was $681,549,928.71. The total amount of plaintiff's property represented by its capital stock, surplus and undivided profits was $600,242,151.57. Plaintiff had no outstanding notes, bonds or debentures maturing less than a year from date of issue. The proportion of plaintiff's capital and surplus which would be allocated to Texas under the formula prescribed by statute and insisted upon by the Secretary of State would be $23,157,705.95. The net book value of assets allocated to Texas under the formula insisted upon by the Secretary of [fol. 16] State, being the statutory formula, would be $26,294,609.26. The actual net book value of plaintiff's actual assets in Texas was $3,079,417.96. The actual value of

plaintiff's capital and surplus representing actual assets in Texas was $2,712,048.50. The excess of capital and surplus allocated to Texas by the Secretary of State over the capital and surplus representing actual assets in Texas amounts to $10,445,657.45.

XXI

As is apparent from the statutes governing calculation of franchise taxes for foreign corporations doing business in Texas, said corporations are required to pay franchise taxes based on that proportion of their total net capital actually devoted to Texas business, and the sole and only purpose of the formula set up by said statutes is to ascertain and arrive at the value of capital assets devoted to and used in connection with Texas business and the tax is computed on the value of such assets at the rates provided by statute, but this construction of the statutes is denied by defendants, who claim the sole purpose of the statutory formula is to value the privilege of doing business in Texas.

XXII

In the light of the facts and as applied to plaintiff, the formula provided by statute for ascertaining the amount of taxable capital in Texas upon which franchise taxes for foreign corporations are based is arbitrary, unreasonable, whimsical and capricious and results in the State levying a tax on capital and assets used by plaintiff in its interstate business and in the State of Texas levying a tax upon property outside the confines of the State of Texas, all of which constitutes an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of the provisions of Article I, Section 8 of the provisions of the Constitution of the United States vesting in the Congress of the United [fol. 17] States the power to regulate commerce with foreign nations and among the several states, and likewise operates to deprive plaintiff of its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of his property without due process of law, for that the requirement that plaintiff pay a franchise tax to the State of Texas calculated on the formula set up by statute results in plaintiff being required to pay a tax on property neither located nor used within the State of Texas, and a tax upon property

used by plaintiff in its interstate and foreign commerce. Much of plaintiff's property located outside of the State of Texas is used in interstate and foreign commerce.

XXIII

As hereinabove plead, plaintiff's business is largely that of a manufacturer of automobiles, tractors, and parts therefor. Its principal manufacturing plants are located outside of the State of Texas and in the State of Michigan. The assets representing the value of its capital and surplus is represented to a large extent by investments in manufacturing plants. Much of its personal property consisting of investments, evidences of indebtedness, and other securities, has a taxable situs referable alone to the state of Michigan, where plaintiff has a business domicile. Thus the value of plaintiff's capital and surplus represented by its total assets at all times material hereto was $600,242,151.57. Of the total actual value of its capital and surplus represented by its total assets, the actual value of such assets in Michigan amounted to $504,111,209.10.

Were the statutory formula herein complained of to be applied to plaintiff's total gross receipts for Michigan business for the period of time material hereto, the result would [fol. 18] be to allocate to Michigan, to represent the total value of its capital and surplus represented by capital actually located in Michigan, $190,536,153.33, or a sum less than the value of its assets representing capital and surplus actually located in Michigan by $336,305,703.12. The total of the Michigan deficiency allocated to Texas is $18,009,733.12. The remainder of the excess of capital theoretically in Texas under the statutory formula over the actual value of capital and surplus in Texas represents a deficiency in allocations to states other than Michigan. Thus, the effect of applying the statutory formula in arriving at the value of plaintiff's assets actually in Texas is to allocate to Texas capital and surplus of a value largely in excess of the actual value of plaintiff's capital and surplus located in Texas, and results in creating deficiencies in locations in other states, principally Michigan, of capital and surplus assets represented in those states. What is true of plaintiff is necessarily true of any large manufacturing concern which manufactures in one state but distributes in others, including Texas, in that business is done when sales are made, but the

work, labor and processing which necessarily precede the making of sales is done at the place of manufacture. The effect of the statute therefore, in the case of plaintiff, is that Texas taxes plaintiff's property actually located in Michigan and states other than Texas, on the theory that a certain arbitrary percentage of plaintiff's property representing the value of its capital and surplus is actually located in Texas, whereas this theory has no support in fact.

There is attached hereto and marked Exhibit X, a true and correct statement showing how a deficiency in capital and surplus actually allocated to Michigan by the arbitrary formula of the statute is arrived at. There is also attached Exhibit Y, giving certain information in respect to total gross receipts from plaintiff's business, gross receipts from [fol. 19] business done in Michigan, and from business done in other states, etc.

All of the facts shown by and set up in said Exhibits X and Y are adopted as if fully set out herein and plaintiff alleges that said facts and figures shown in said exhibits are true and correct.

XXIV

In this connection, the plaintiff here now alleges that the facts, all and singular, claimed by plaintiff to exist with respect to it and its business in its said letter of protest to the former Secretary of State dated June 23, 1936, do all and singular, in truth and in fact, exist as set out in said letter, and as shown by the accompanying Exhibit A attached thereto.

XXV

Wherefore plaintiff says that there has been unlawfully and illegally collected from it by the Secretary of State of the State of Texas as franchise taxes for the year beginning May 1, 1936, and as penalties accruing because of the nonpayment of that part of the demands of the Secretary of State for franchise taxes which are illegal, unconstitutional and unenforceable, the sum of $7529.25, being the additional franchise tax of $6023.40, and the penalty of $1505.85. Said excessive payment having been made pursuant to the illegal demands of the Secretary of State in all things pursuant to the provisions of Chapter 214 of the Acts of the 43rd Legislature of the State of Texas, and said amounts so paid under protest having been dealt with and handled as is provided

by said Chapter 214 of the Acts of the 43rd Legislature of the State of Texas, this suit being filed within ninety (90) days from the date of such payment under protest and the issues herein being those arising out of the grounds and reasons set forth in the written protest as originally filed, [fol. 20] plaintiff is entitled to a final determination herein that such money so paid by it was unlawfully demanded by the Secretary of State, and that same belongs to plaintiff, and for judgment of the court in such cases made and provided, as is contemplated by said Chapter 214 of the Acts of the 43rd Legislature of the State of Texas.

Wherefore, plaintiff prays that citation issue in terms of law to the defendants, and each of them, requiring them to appear and answer herein, and that on final trial hereof plaintiff have judgment finally determining that said sum of $7529.25 so paid to the Secretary of State by plaintiff under protest was unlawfully demanded of and collected from plaintiff by the Secretary of State, and that same belongs to plaintiff, and directing said State Treasurer to refund such amount, together with the pro rata interest earned thereon, to plaintiff by the issuance of a refund warrant, and plaintiff prays for such other and further relief in the premises, general and special, legal and equitable, to which it may show itself entitled.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Ford Motor Company.

EXHIBIT "C" TO PETITION

(True Copy)

June 23, 1936

Secretary of State, State of Texas, Austin, Texas.

DEAR SIR:

We, the undersigned, Ford Motor Company, a corporation organized under the laws of the State of Delaware, have heretofore, within the time required by the statutes of the State of Texas, filed on the forms submitted by you our franchise tax return as of December 31, 1935, for the [fol. 21] purpose of determining and paying the franchise tax due by us to the State of Texas for the year beginning

May 1, 1936. In that franchise tax return we showed the following items which correctly reflected said items as of December 31, 1935:

Capital Stock—Subscribed, issued and outstanding (including reacquired or treasury stock):	
(a) Preferred	None
(b) Common (Par Value)	$17,264,500.00
Net surplus and undivided profits	582,977,651.57
Bonds, notes and debentures maturing one year or more from date of issue (subscribed, issued and outstanding)	None
Total	$600,242,151.57

In said return we also showed the following items as of December 31, 1935, which correctly represented said items:

Gross Receipts for the year ended December 31st, 1935:

(a) Business done in Texas	$34,272,887.72	3.8580606%
(b) Business done outside of Texas	854,072,087.75	96,1419394%
Total Gross Receipts	$888,344,975.47	100%

You have advised us by your letter dated May 5, 1936, and by the State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for Account No. 2941, that under Article 7084 of the Revised Statutes of Texas 1925, as amended, the franchise tax to be paid by us for the year beginning May 1, 1936, is to be computed upon that proportion of our outstanding capital stock, surplus and undivided profits, plus the amount of our outstanding bonds, notes and de- [fol. 22] bentures other than those maturing in less than a year from date of issue, as the gross receipts from our business done in Texas bears to our total gross receipts, and that on this basis our franchise tax for the year beginning May 1, 1936, will be $7,247.40.

It seems apparent that you have arrived at this figure by multiplying the above figure of $600,242,151.57 by the above percentage figure of 3,8580606%, and arrived at the figure of $23,157,705.95, as being that portion of our capital and surplus upon which said franchise tax is to be computed

at the rate of 60 cents per thousand for the first $1,000,000 and 30 cents per thousand or fractional part thereof for all in excess of $1,000,000. In our franchise tax report we show that our total taxable capital, as shown in item No. 10 on our franchise tax return, was $3,079,417.96, and our franchise tax based thereon, at the rates prescribed by the statutes of Texas, was $1,224. We *here* heretofore paid to you before May 1, 1936, such sum of $1,224, but you, by your letter to us of May 5th, and by State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for account No. 2941, have advised that our total franchise tax would be $7,247.40 and that we are liable, after the above $1,224 has been credited to our account, for an additional tax of $6,023.40 plus a 25% penalty of $1,505.85 for failure to pay the full amount of said alleged franchise tax on or before May 1, 1936, and have advised us that unless said additional amount and penalty are paid on or before July 1, 1936, our right to do business in Texas will be forfeited.

Because of your demands set forth in your letter of May 5, 1936, and in State of Texas Delinquent Franchise Tax Notice dated May 29, 1936, for Account No. 2941, for the payment of said additional amount and penalties, and advice therein contained that the said amount should be paid on or before July 1, 1936, in order to avoid the forfeiture [fol. 23] of our right to do business in Texas and in view of the provisions of Article 7091 of the Revised Statutes of Texas, 1925, as amended, providing for the forfeiture of our right to do business in Texas if said amount is not paid to you on or before July 1, we enclose certified check in your favor for the sum of $7,529.25, being the above alleged additional franchise tax of $6,023.40 and said penalty of $1,505.85.

This additional amount is being paid to you under protest under the provisions of Chapter 214 of the Acts of the Forty-Third Legislature of the State of Texas, and we claim said additional tax and penalty are unlawful and illegal, and are not lawfully and legally owing by us for the reasons hereinafter set forth in this protest, and we advise you that said sums are so being paid under protest and that we will within the time prescribed by said Chapter 214 bring suit against you, the State Treasurer and the Attorney General of the State of Texas for the recovery of said additional tax and penalty as provided for in said Chapter 214.

We claim said additional tax and penalty are unlawful, and you are not lawfully entitled to demand or collect the same on the following grounds and reasons:

We are a corporation organized under the laws of the State of Delaware, with our principal office, however, in the State of Michigan. Our principal business if the manufacture and sale of automobiles and parts therefor, our principal manufacturing plant being located in Michigan, in which State we maintain our principal office from which we direct all of our activities and at which we keep our principal corporate records. We are engaged in the sale and distribusion of automobiles and parts therefor in interstate commerce and in commerce between the United States and foreign nations, by far the greater part of our sales being in interstate and foreign commerce, and only a small amount [fol. 24] of such sales being in intrastate business in the State of Texas. In fact, the gross receipts from our business done in Texas during the year 1935 was only slightly more than 3.85% of the gross receipts from our entire business. In addition we have large investments in stocks or corporations organized and operating in foreign countries, and own large amounts of bonds, mortgages, notes, United States securities, municipal and state securities and miscellaneous investments, none of which are used, held or located in the State of Texas.

Attached hereto as Exhibit A is a detailed analysis of our assets and capital and surplus, which will be self explanatory and which is referred to here as if copied in full at this point. The first column gives the net book value of our total assets, the second column gives the value of our capital and surplus representing our total assets (being the net book value of our assets less our liabilities); the third column represents the portion of the capital and surplus allocated to the State of Texas under formula set forth in Article 7084 of the Revised Statutes of Texas and being the amount allocated by you to Texas for the purpose of computing the franchise tax; the fourth column represents the net book value of our assets allocated to Texas under said formula, being 3.8580606% of the net book value of our total assets; the fifth column sets forth the actual net book value of our actual assets in the State of Texas; the sixth column shows the amount of 'capital stock, surplus and undivided profits' representing the actual assets in the State of Texas; and the seventh column represents the excess of the portion

of our capital and surplus allocated to Texas by you and by said formula over the capital and surplus representing the assets actually situated in the State of Texas.

[fol. 25] From this it will be seen that you, by following the said formula, have attributed to Texas $23,157,705.95 of our capital and surplus, when the actual net book value of all of our assets in Texas is only $3,079,417.96, which figure also is more than the actual value of said assets. The sum of $1,224 which we have heretofore paid you is the amount of our franchise tax computed on said figure of $3,079,417.96 whereas the lawful amount of said franchise tax was and is an amount not more than $1,113.90 which is computed at the rates prescribed by the statutes of Texas applied to the amount of $2,712,048.50 (as shown by Column 6 of Exhibit A attached hereto) which is the value of the 'capital stock, surplus and undivided profits' of this company which represents the said assets actually situated in the State of Texas of the net book value of $3,079,417.96. On the other hand, you have computed our franchise tax and have demanded payment of the same on the basis of $23,157,705.95 of our capital and surplus allocated by you and by said formula to the State of Texas, an amount more than seven times the value of all of our assets located in Texas, and more than eight times the value of the 'capital stock, surplus and undivided profits' representing said assets in Texas.

Under the circumstances, the requirement that we pay said additional tax is the creation by the State of Texas of an arbitrary and unreasonable burden upon our interstate and foreign commerce in violation of the provisions of Article I, Section 8 of the Constitution of the United States vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several states, and likewise deprives us of our property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person [fol. 26] of his property without due process of law, in that said additional franchise tax demanded is a tax upon property of ours neither located nor used within the State of Texas and is a tax upon our business transacted outside of the State of Texas. In view of said Section 8 of Article I of the United States Constitution and of said Fourteenth Amendment thereto, neither you nor the State of Texas has

any lawful right to demand or require that we pay said additional amount of franchise tax and penalty.

We are paying said additional tax and penalty, however, under protest and compulsion and only because of the provisions of Article 7091 of the Revised Statutes of Texas, 1925, as amended, providing for the forfeiture of our right to do business if said additional tax and penalty are not paid on or before July 1st and of your letter of May 5, and State of Texas Delinquent Franchise Tax Notice dated May 29, 1936 for Account No. 2941, advising that said additional tax and penalty must be paid on or before said date in order for us to avoid the incurring of said forfeiture.

Ford Motor Company, (Signed) B. J. Craig, Secretary and Assistant Treasurer.

BJC:MK.

(Here follow two pasters, side folios 27 and 28)

EXHIBIT "A" TO LETTER OF PROTEST

Item	Net Book Value Total Assets (Col. 1)	Value of Capital & Surplus representing Total Assets (88.070165666% (Col. 2)	Portion of Capital and Surplus Allocated to Texas by Secretary of State (3.8580606% of Col. 2) (Col. 3)	Net Book Value of Assets Allocated to Texas Under Formula Of Secretary of State (113.545829277% of Col. 3) (Col. 4)	Actual Net Book Value of Actual Assets in Texas (Col. 5)	Value of Capital and Surplus representing actual assets in Texas (88.070165666% of Col. 5) (Col. 6)	Excess of Capital & Surplus allocated to Texas by Secretary of State over Capital & Surplus representing actual Assets in Texas (Col. 3 minus Col. 6) (Col. 7)
d and Land Improvements	$53,068,058.21	$46,737,126.78	$1,803,146.67	$2,047,397.84	$212,044.49	$186,747.94	$1,616,398.73
ldings	87,936,457.03	77,445,783.39	2,987,905.24	3,392,641.79	1,115,100.57	982,070.92	2,005,834.32
chinery and Equipment:							
Blast Furnaces & Coke Ovens	1,616,699.42	1,423,829.86	54,982.22	62,393.24			54,932.22
Open Hearth Furnaces & Steel Mills	13,835,959.33	12,185,352.30	470,118.28	533,799.70			470,118.28
Patterns and Pattern Equipment	157,903.62	139,065.98	5,365.25	6,091.98			5,365.25
Freight Car Equipment	549,843.20	484,247.82	18,682.57	21,213.28			18,682.57
Steam Locomotive Equipment	287,512.33	253,212.59	9,769.10	11,092.40			9,769.10
Power Plant Equipment	19,379,520.99	17,067,576.24	658,477.43	747,673.76	52,496.00	46,234.11	612,243.32
Lake and Ocean Ships, Barges, Tugs, etc.	7,871,894.91	6,932,790.89	267,471.27	303,702.47			267,471.27
Other Machinery, Tools & Equipment	42,450,378.75	37,386,118.87	1,442,379.12	1,637,761.26	89,475.56	78,801.27	1,363,577.85
entories	68,568,702.40	60,388,569.80	2,329,827.62	2,645,422.10	1,149,180.73	1,012,085.37	1,317,742.25
struction in Process	5,387,095.47	4,744,423.91	183,042.75	207,837.40	16,811.16	14,805.62	168,237.13
ferred Charges:							
Unamortized Dies	1,124,627.21	990,461.05	38,212.59	43,388.80			38,212.59
Prepaid Insurance	749,036.26	659,677.48	25,450.76	28,898.27			25,450.76
Other prepaid expenses	1,255,923.29	1,106,093.72	42,673.77	48,454.28			42,673.77
ents	137,502.90	121,099.03	4,672.07	5,304.94			4,672.07
cks of Foreign Corporations	66,413,152.05	58,490,173.03	2,256,586.32	2,562,259.65			2,256,586.32
nds, Mortgages and Notes	61,475.00	54,141.13	2,088.80	2,371.74			2,088.80
ited States Securities	82,026,813.46	72,241,150.53	2,787,107.37	3,164,644.18			2,787,107.37
nicipal and State Securities	7,906,647.23	6,963,397.31	268,652.09	305,043.24			268,652.09
scellaneous Investments	1,019,901.00	898,228.50	34,654.20	39,348.39			34,654.20
sh	137,022,959.86	120,676,348.00	4,655,766.64	5,286,428.87	1,929.63	1,699.43	4,654,067.21
tes Receivable	2,961,303.59	2,608,024.98	100,619.18	114,248.87			100,619.18
counts Receivable	79,760,561.20	70,245,258.38	2,710,104.64	3,077,210.81	442,378.92	389,603.84	2,320,500.80
Total	$681,549,928.71	$600,242,151.57	$23,157,705.95	$26,294,609.26	$3,079,417.96	$2,712,048.50	$20,445,657.45

[fol. 28]

EXHIBIT "X" TO PETITION

Item	Net Book Value Total Assets	Value of Capital & Surplus Representing Total Assets (88.070165666%)	Portion of Capital & Surplus Allocated to Michigan by Secretary of State (27.[illegible]3015591% of Col. 2)	Value of Assets Allocated to Michigan under Formula of Secretary of State (113.5[illegible]5829277% of Col. 3)	Value of Actual Assets in Michigan	Value of Capital and Surplus Representing Actual Assets in Michigan (88.070165666% of Col. 5)	Excess of Capital & Surplus Allocated to Michigan by Secretary of State over Capital & Surplus Representing Actual Assets in Michigan (Red indicates Deficiency) (Col. 3 minus Col. 6)
	(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5)	(Col. 6)	(Col. 7)
1. Land and Land Improvements	$53,068,058.21	$46,737,126.78	$13,065,972.10	$14,835,866.37	$36,703,831.20	$32,325,124.95	$19,259,152.85
2. Buildings	87,936,457.03	77,445,783.39	21,650,976.75	24,583,781.10	47,190,955.65	41,561,152.82	19,916,176.07
3. Machinery and Equipment:							
(a) Blast Furnaces and Coke Ovens	1,616,699.42	1,423,829.86	398,050.17	451,969.37	1,616,699.42	1,423,829.86	1,025,779.69
(b) Open Hearth Furnaces & Steel Mills	13,835,959.33	12,185,352.30	3,406,573.84	3,868,022.52	13,835,959.33	12,185,352.30	8,778,778.46
(c) Patterns and Pattern Equipment	157,903.62	139,065.98	38,877.70	44,144.01	157,903.62	139,065.98	100,188.28
(d) Freight Car Equipment	549,843.20	484,247.82	135,377.78	153,715.82	549,843.20	484,247.82	348,870.04
(e) Steam Locomotive Equipment	287,512.33	253,212.59	70,788.88	80,377.82	287,512.33	253,212.59	182,423.71
(f) Power Plant Equipment	19,379,520.99	17,067,576.24	4,771,463.08	5,417,797.32	17,879,635.51	15,746,624.60	10,975,161.52
(g) Lake & Ocean Ships, Barges, Tugs, etc.	7,871,894.91	6,932,7[illegible] 89	1,938,151.93	2,200,690.68	7,871,894.91	6,932,790.89	4,994,638.96
(h) Other Machinery, Tools & Equipment	42,450,378.75	37,386,118.[illegible]	10,451,776.13	11,867,555.88	37,476,393.04	33,005,521.44	22,553,745.31
4. Inventories	68,568,702.40	60,388,509.80	16,882,410.68	19,169,273.21	28,835,088.02	25,395,109.78	8,512,699.10
5. Construction in Process	5,387,095.47	4,744,423.91	1,326,365.46	1,506,032.66	5,183,063.01	4,564,732.18	3,238,366.72
6. Deferred Charges:							
(a) Unamortized Dies	1,124,627.21	990,461.05	276,896.28	314,404.18	1,124,627.21	990,461.05	713,564.77
(b) Prepaid Insurance	749,036.26	659,677.48	184,421.43	209,402.84	704,627.63	620,566.72	436,145.29
(c) Other prepaid expenses	1,255,923.29	1,106,093.72	309,222.89	351,109.69	1,247,808.49	1,098,947.00	789,724.11
7. Patents	137,502.90	121,099.03	33,854.81	38,440.72	137,502.90	121,099.03	87,244.22
8. Stocks of Foreign Corporations	66,413,152.05	58,490,173.03	16,351,689.15	18,566,661.04	66,413,152.05	58,490,173.03	42,138,483.88
9. Bonds, Mortgages and Notes	61,475.00	54,141.13	15,135.86	17,186.14	61,475.00	54,141.13	39,005.27
10. United States Securities	82,026,813.46	72,241,150.53	20,195,953.89	22,931,663.32	82,026,813.46	72,241,150.53	52,045,196.64
11. Municipal and State Securities	7,906,647.23	6,963,397.31	1,946,708.35	2,210,406.14	7,906,647.23	6,963,397.31	5,016,688.96
12. Miscellaneous Investments	1,019,901.00	898,228.50	251,111.47	285,126.60	1,019,901.00	898,228.50	647,117.03
13. Cash	137,022,959.86	120,676,348.00	33,736,643.76	38,306,551.92	137,824,109.52	121,381,921.58	87,645,277.82
14. Notes Receivable	2,961,303.59	2,608,024.98	729,107.33	827,870.96	2,96[illegible],303.59	2,608,024.98	1,878,917.65
15. Accounts Receivable	79,760,561.20	70,245,258.38	19,637,976.26	22,298,103.02	73,380,505.81	64,626,333.03	44,988,356.77
Total	$681,549,928.71	$600,242,151.57	$167,805,505.98	$190,536,153.33	$572,397,253.13	$504,111,209.10	$336,305,703.12

8/19/36

[fol. 29] EXHIBIT "Y" TO PETITION

9-24-36.

Ford Motor Company

3674 Schaefer Road—Dearborn Michigan

1936 Texas Franchise Tax

Amount of Michigan Capital and Surplus Allocated to Texas

Item No.	Particulars	Amount or Percentage
Col. 1	Col. 2	Col. 3
1.	Total gross receipts (everywhere)	$888,344,975.47
2.	Gross receipts from business done in Michigan	248,348,400.23
3.	Total gross receipts excluding gross receipts from business done in Michigan (item 1 minus item 2)	639,996,575.24
4.	Gross receipts from business done in Texas	34,272,887.72
5.	Ratio of Texas gross receipts to total gross receipts excluding gross receipts from business done in Michigan (item 4 divided by item 3)	5.3551673269%
6.	Deficiency of capital and surplus allocated to Michigan by Texas method (Exhibit —, Col. 7)	$336,305,703.12
7.	Amount of Michigan deficiency allocated to Texas (item 6 multiplied by item 5)	18,009,733.13

[fol. 30] IN UNITED STATES DISTRICT COURT

DEFENDANTS' ORIGINAL ANSWER—Filed January 23, 1937

To the Honorable R. J. McMillan, Judge:

Now come R. B. Stanford, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the

State of Texas, and William McCraw, Attorney General of the State of Texas, defendants herein, and demur generally to plaintiff's original petition filed herein, and say that the allegations of fact contained in such petition, if taken as true, constitute no cause of action against these defendants.

Defendants demur generally to plaintiffs' original petition filed herein, and especially to that portion of such petition which attempts to set forth that the statute of the State of Texas complained of therein, the allegations of fact contained in such petition being taken as true, constitutes a burden upon interstate commerce.

Defendants further demur generally to plaintiff's original petition filed herein, and especially to that portion of said petition, the allegations of fact being taken as true, which says that the statute complained of deprives the plaintiff of property without due process of law.

Wherefore, defendants pray that plaintiff recover nothing by its suit, and that defendants go hence and recover their costs about this cause expended.

Wm. McCraw, Attorney General of Texas; Llewellyn B. Duke, Assistant Attorney General; Earl Street, Assistant Attorney General.

[fol. 31] IN UNITED STATES DISTRICT COURT

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER—Filed January 26, 1937

To the Honorable R. J. McMillan, Judge:

Now come Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, defendants herein, and demur generally to plaintiff's original petition filed herein, and say that the allegations of fact contained in such petition, if taken as true, constitute no cause of action against these defendants.

Defendants demur generally to plaintiff's original petition filed herein, and especially to that portion of such petition which attempts to set forth that the statute of the State of Texas complained of therein, the allegations of fact contained in such petition being taken as true, constitutes a burden upon interstate commerce.

Defendants further demur generally to plaintiff's original petition filed herein, and especially to that portion of said petition, the allegations of fact being taken as true, which says that the statute complained of deprives the plaintiff of property without due proess of law.

Defendants deny all and singular the allegations in plaintiffs' petition contained and demand strict proof thereof, and of this it puts itself upon the country.

[fol. 32] Wherefore, defendants pray that plaintiff recover nothing by its suit, and that defendants go hence and recover their costs about this cause expended.

Wm. McCraw, Attorney General of Texas; Llewellyn B. Duke, Assistant Attorney General; Earl Street, Assistant Attorney General, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' AMENDED ANSWER—Filed October 15, 1937

To the Honorable R. J. McMillan, Judge:

Now come Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, defendants herein, and in response to plaintiff's first amended original petition, and in lieu of all other answers heretofore filed in this cause, and demur generally to plaintiff's said first amended original petition, and say that the allegations thereof are insufficient in law to require these defendants to answer, and that the allegations of fact contained in said petition, if taken as true, constitute no cause of action against these defendants.

[fol. 33] Defendants demur generally to plaintiff's first amended original petition filed herein, and especially to that portion thereof which attempts to set forth that the statute of the State of Texas complained of herein, the allegations of fact contained in said petition being taken as true, constitutes a burden on interstate commerce.

Defendants demur generally to plaintiff's first amended original petition filed herein, and especially to that portion of said petition, the allegations of fact being taken as true, which says that the statute complained of herein deprives the plaintiff of property without due process of law.

Wherefore, defendants pray that plaintiff recover nothing by its suit, and that defendants go hence and recover their costs about this cause expended.

William McCraw, Attorney General of Texas; Earl Street, Assistant Attorney General; L. B. Duke, Assistant Attorney General; C. M. Kennedy, Assistant Attorney General.

[fol. 34] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed October 15, 1937

On the 15th day of October, 1937, the above styled and numbered cause coming regularly on to be heard, came the plaintiff, Ford Motor Company, and announced ready for trial, and came the defendants, Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McGraw, Attorney General of the State of Texas, and announced ready for trial, whereupon the defendants presented their general demurrer to plaintiff's First Amended Original Petition, and the Court heard argument on said demurrer by both defendants and the plaintiff. And the Court being of the opinion that said demurrer is well taken and should be sustained;

It is, Therefore, Ordered, Adjudged and Decreed by the Court that the general demurrer of the defendants to the First Amended Original Petition of plaintiff be in all things sustained, to which action of the Court in so sustaining said demurrer plaintiff then and there in open court excepted; and the plaintiff refusing to amend, the Court is of the opinion that defendants are entitled to a judgment in their favor on the merits of this controversy.

It is, Therefore, Ordered, Adjudged and Decreed by the Court on this, the 15th day of October, 1937, that plaintiff take nothing by its suit herein against the defendants, Edward Clark, Secretary of State, Charley Lockhart, State Treasurer, and William McCraw, Attorney General, of the State of Texas, or any of them, and that said defendants go hence without day and recover of and from plaintiff all their costs in this behalf expended, for which execution may issue, as by law provided.

[fol. 35] To the action of the Court in so rendering judgment against it and in favor of the defendants, plaintiff then and there in open court excepted.

Robert J. McMillan, Judge.

O. K. Earl Street, Ass't Atty. Gen. of Texas.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND WAIVER OF ISSUANCE AND SERVICE OF CITATION—Filed November 19, 1937

To Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, William McCraw, Attorney General of the State of Texas, or their attorneys of record, William McCraw, Earl Street, L. B. Duke, and C. M. Kennedy:

You will take notice that plaintiff, Ford Motor Company, appeals from the final judgment entered in the above entitled and numbered cause, as of October 15, 1937, and has deposited with the Clerk of the United States District Court at Austin, Texas, an appropriate petition for such appeal, together with Assignments of Error, and a bond in the form and amount required by law.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Plaintiff.

[fol. 36] We acknowledge service of the above notice, together with copy of the Assignments of Error, on this the 18th day of November, 1937, and hereby waive further service thereof, and also hereby accept service of citation on appeal and waive any further action towards obtaining the issuance and service of citation on appeal.

Dated this 18th day of November, 1937.

Edward Clark, Secretary of State of the State of Texas; Charley Lockhart, State Treasurer of the State of Texas; William McCraw, Attorney General of the State of Texas, by William McCraw, Atty. Gen. of Texas; Earl Street, Asst. Atty. Gen. of Texas; L. B. Duke, Asst. Atty. Gen. of Texas; C. M. Kennedy, Asst. Atty. Gen. of Texas, their attorneys of Record, by Earl Street.

[fol. 37] IN UNITED STATES DISTRICT COURT

APPLICATION FOR APPEAL—Filed November 19, 1937

To the Honorable R. J. McMillan, Judge of said Court:

Comes now Ford Motor Company and shows to the Court that on October 15, 1937, a final judgment was entered by Your Honor in the above entitled and numbered cause, against this plaintiff and in favor of all of the defendants in this cause, to-wit, Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, and the costs of such named defendants were adjudged against plaintiff, and plaintiff's right to recover against said named defendants was by the Court denied, the Court refusing to grant to plaintiff any of the relief prayed for by it, and refusing to determine that the sum of Seventy five hundred twenty-nine and 29/100 Dollars ($7529.29) heretofore paid by plaintiff to the Secretary of State of Texas under protest was unlawfully demanded of and collected from plaintiff by the Secretary of State, and refusing to determine that said sum belongs to plaintiff, and refusing to direct the State Treasurer to refund such amount, together with pro rata interest earned thereon, to plaintiff by the issuance of a refund warrant, and the Court denied to plaintiff all the relief prayed for by the plaintiff.

Petitioner, feeling aggrieved by said judgment and other rulings of the Court in said cause, herewith petitions the Court for an order allowing it to prosecute an appeal to the United States Circuit Court of Appeals for the Fifth Circuit under the laws of the United States in such cases made and provided.

[fol. 38] Wherefore, premises considered, petitioner prays for the allowance of an appeal in this behalf to said United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana; for the correction of the errors complained of and herewith assigned; and that an order be made fixing the amount of security to be given by appellant, conditioned as the law directs, and that upon giving such bond as may be required, all further proceedings as against this plaintiff or in favor of said defendants, or

seded until the determination of said appeal by the Circuit Court of Appeals.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Appellant.

Service accepted this 18th day of November, 1937.

William McCraw, Attorney General of Texas; Earl Street, Assistant Attorney General of Texas; L. B. Duke, Asst. Attorney General of Texas; C. M. Kennedy, Asst. Atty. General of Texas, Attorneys for All Defendants, by Earl Street.

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Filed November 19, 1937

Be it Remembered that the petition of Ford Motor Company, plaintiff herein, for allowance of an appeal from the judgment heretofore entered in this cause, is granted, and the amount of bond to be filed by it is fixed at Five hundred Dollars ($500). All further proceedings herein as between plaintiff and defendants, Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, are suspended, pending the judgment of the Circuit Court of Appeals.

Dated November 19th, 1937.

Robert J. McMillan, Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed November 19, 1937

To the Said Honorable Court:

Comes now plaintiff in the above entitled and numbered cause; and in connection with its appeal herein, presents the following assignments of error upon which it will rely for a reversal:

I

The Court erred in sustaining the general demurrer in-

Original Petition, and by deciding that the facts stated in such petition were not sufficient to constitute a cause of action, and by deciding that the facts stated in said petition did not entitle the plaintiff to any of the relief prayed for by it.

II

It was error for the Court to fail and refuse to render judgment granting the plaintiff the relief prayed for by it, it appearing that the defendants relied solely upon a general demurrer to plaintiff's petition in defense of plaintiff's claims and demands and causes of action.

III

The Court erred in sustaining the general demurrer of the defendants to plaintiff's pleading and, upon plaintiff's refusal to amend, in rendering judgment based on said ruling against plaintiff and in favor of defendants.

IV

The Court erred in sustaining the general demurrer of the defendants to plaintiff's First Amended Original Peti- [fol. 41] tion, in so far as said ruling is based upon the holding that the facts alleged in plaintiff's First Amended Original Petition failed to allege sufficient facts to show that, as applied to plaintiff, the Texas Franchise Tax Act applicable to foreign corporations does not act as an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of the provisions of Article I, Section 8, of the Constitution of the United States.

V

The Court erred in sustaining the general demurrer of the defendants to plaintiff's First Amended Original Petition, in so far as that ruling is based upon the Court's holding that the facts alleged in plaintiff's First Amended Original Petition are insufficient to show that the Texas Franchise Tax Act governing the payment of franchise taxes by foreign corporations, does not, as applied to plaintiff, operate to deprive plaintiff of its property without due process of law, in violation of the provisions of the 14th Amendment to the Constitution of the United States.

VI

The Court erred in sustaining the general demurrer of the defendants to the First Amended Original Petition of plaintiff, in so far as the court's ruling constituted a holding that the Texas Franchise Tax Act applicable to foreign corporations, when applied to plaintiff under the facts alleged in its petition, does not deny plaintiff due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States, because the operation of said Act, as applied to plaintiff, under the facts alleged in its petition, either operates to permit the State of Texas to levy a tax on capital and assets beyond the confines of the State of Texas or, if viewed [fol. 42] as based in part on the amount of business done in Texas, said tax act is purely whimsical, arbitrary and capricious, for that the formula therein provided for ascertaining the amount of the tax, does not establish any rational relation between the amount of business done in Texas and the amount of the franchise taxes payable by corporations doing such business.

VII

The Court erred in sustaining the demurrer interposed by defendants to plaintiff's First Amended Original Petition filed in this action, and in holding that the formula provided by statute for ascertaining the amount of plaintiff's taxable capital in Texas, upon which franchise taxes are based, does not result in the State of Texas levying a tax on capital and assets beyond the confines of the State of Texas used in its interstate business which constitutes an unreasonable burden on interstate commerce in violation of the provisions of Article I, Section 8 of the Constitution of the United States.

VIII

The Court erred in sustaining the demurrer interposed by defendants to plaintiff's First Amended Original Petition filed in this action, and in holding that the formula provided by statute for ascertaining the amount of plaintiff's taxable capital in Texas, upon which franchise taxes are based, does not result in the State of Texas levying a tax on capital and assets beyond the confines of the State

of Texas which constitutes a deprivation of property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

[fol. 43] IX

The Court erred in sustaining and refusing to overrule the general demurrer of the defendants to plaintiff's First Amended Original Petition, in that the facts alleged in plaintiff's petition show that the Franchise Tax Act of the State of Texas applicable to foreign corporations, when and as applied to plaintiff, operates illegally to deprive plaintiff of its property without due process of law, because said Franchise Tax Act so applicable to foreign corporations, when applied to plaintiff, either enables the State of Texas to tax property beyond its jurisdiction, or enables the State of Texas to condition the privilege extended foreign corporations transacting business within the State of Texas, upon payment of taxes which have no reasonable or rational relation to the value of the privilege granted.

Wherefore, by reason of the errors committed against it, as hereinabove shown and assigned, and other errors apparent on the face of the record herein, appellant prays that final judgment heretofore rendered against it be reversed and judgment rendered in its favor against Defendants Edward Clark, Secretary of State of the State of Texas, Charley Lockhart, State Treasurer of the State of Texas, and William McCraw, Attorney General of the State of Texas, as prayed for in its First Amended Original Petition herein.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Appellant.

[fols. 44-50] Bond on appeal for $500.00 approved and filed November 19, 1937, omitted in printing.

[fol. 51] In United States District Court

Appellant's Election to Have Record Printed under Clerk's Supervision—Filed November 19, 1937

Comes now the Appellant and elects to take and file in the United States Circuit Court of Appeals a transcript of

that part of the record in this cause which is requisite for a rehearing thereof in said Appellate Court, same to be printed under the supervision of its Clerk, the portions requisite therefor being stated in the Præcipe for Transcript of record filed herein.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Appellant.

[fol. 52] In United States District Court

Præcipe for Record on Appeal—Filed November 19, 1937

To the Honorable Maxey Hart, Clerk of Said Court:

Please prepare and certify forthwith, or as soon as may be, a transcript of the record in the above entitled and numbered cause, for appeal on same, incorporating in the transcript the following pleadings, and other portions of the record, which includes all deemed material for the review, to-wit:

(1) The usual caption.
(2) Plaintiff's First Amended Original Petition.
(3) Defendants' answers, both the original answer on the merits, and demurrer in lieu of answer.
(4) Judgment of the Court.
(5) Notice of Appeal and Waiver of Citation.
(6) Application for Appeal.
(7) Order allowing Appeal and fixing Bond.
(8) Assignments of Error.
(9) Appellant's Bond, showing approval thereof by the Court.
(10) Notice of Appellant's election to have record printed under the supervision of the Clerk of the Circuit Court of Appeals.
(11) Præcipe for Transcript.
(12) Certificate and authentication by the Clerk of this Court.

Baker, Botts, Andrews & Wharton, by Gaius G. Gannon, Attorneys for Plaintiff.

[fol. 53] We acknowledge service of the foregoing præcipe for transcript of the record, waive further service of

notice of its filing, and agree that the matters called for therein constitute all matters deemed material for the review of this case, and a right to request insertion of any additional part of the record is hereby waived on behalf of defendants.

Wm. McCraw, Atty. Gen. of Texas; L. B. Duke, Ass't Atty. Gen.; C. M. Kennedy, Ass't Atty. Gen.; Earl Street, Ass't Atty. Gen.

Dated: This the 18th day of Nov., A. D. 1937.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 10, 1938

No. 8664

FORD MOTOR COMPANY, a Corporation,

versus

EDWARD CLARK, Secretary of State of the State of Texas, et al.

On this day this cause was called, and, after argument by Gaius G. Gannon, Esq., for appellant, and Earl Street, Esq., for appellees, was submitted to the Court.

[fol. 56] OPINION OF THE COURT—Filed December 15, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8664

FORD MOTOR COMPANY, a Corporation, Appellant,

versus

EDWARD CLARK, Secretary of State of the State of Texas, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(December 15, 1938)

Before Sibley, Hutcheson and Holmes, Circuit Judges

SIBLEY, Circuit Judge:

This appeal is from the dismissal on demurrer of an action by Ford Motor Company against officers of the State of Texas to recover certain State franchise taxes for the

year 1936 paid under protest. The contention is that in the amount sued for the exaction violated the interstate commerce clause of the federal Constitution in that it burdened the interstate business of the taxpayer, and the due process clause of the Fourteenth Amendment by taxing property outside the State of Texas.

[fol. 57] The franchise tax law, Revised Statutes of 1925, Arts. 7084, 7085, as amended, lays a tax on domestic and foreign corporations chartered or authorized to do business in Texas, payable each year in advance and graduated according to the amount of capital stock, surplus and undivided profits, plus outstanding notes and bonds running for more than a year; or when business is done also in other States, on that proportion of the capital, etc., which the gross receipts from business done in Texas the previous year bears to the gross receipts from the entire business of the corporation. The calculation is made from a return under oath by the taxpayer. The law was analyzed and its general constitutionality as against the commerce clause and the Fourteenth Amendment declared in Southern Realty Co. vs. McCallum, 65 Fed. (2) 934, and its application to the circumstances of the eighteen complainants in that case was upheld. Certiorari was refused, 290 U. S. 692, and our interpretation of the law was indorsed by the State Court of Civil Appeals in United North & South Development Co. vs. Heath, 78 S. W. (2) 650. We said: "The tax is not laid on property or income, though both are regarded in measuring it. It is laid on the privilege granted to the corporation, whether domestic or foreign, to do business for one year in Texas with the capital set-up which it has chosen to use. The tax for this opportunity to do the year's business is directly measured by the business capital about to be used rather than by the income which it may afterwards appear was realized. The origin, form and location of that capital, whether in or out of the state, is unimportant, provided it is to contribute to the corporation's business power within the State. When the corporation is to do business in other States also, avoidance of a trespass on interstate commerce, or on that done beyond the territorial jurisdiction of the taxing State, is secured by apportioning the business potency of the corporation [fol. 58] represented by its business capital according to the business actually done the preceding calendar year in the taxing State as indicated by its gross receipts, compared

with its business everywhere." To this exposition of the law we adhere.

The appellant's real contention is that because it both manufactures and sells automobiles, the principal manufacturing activity and the capital necessary for it being in Michigan, gross income from sales is an arbitrary basis of apportionment in its case; and because the proportion of its capital investments located in Texas is far less than the proportion of its income there received, there is in effect a taxing of investments outside that State; and since the capital and investments outside the State are used largely in interstate business there is a burden on interstate commerce.

The facts pleaded are, broadly stated, that Ford Motor Company, a Delaware corporation, was engaged in manufacturing automobiles and tractors and the parts thereof principally in Michigan, its business domicile, where its largest investments in plant were and where its owned securities are said to be taxable, altogether about $500,000,000 worth out of a total of about $600,000,000. It sold some of its product in Michigan, and some of it in interstate and foreign commerce, but in large measure the parts for the machines were shipped to assembling plants in other States, and there put together, finished and tested, and sold locally. This was done in Texas. In 1935 the machines there finished and sold produced a gross income of $34,272,887. The receipts of the Company everywhere were $888,344,975. The Texas business was thus 3.858% of the whole. The Company's total capital set-up as defined by the statute was returned as $600,242,151, but the return stated: "Total capital actually located in or used in connection with busi- [fol. 59] ness done in Texas, $3,079,417." Taxes were tendered calculated on the latter figure. It is readily seen that 3.858% of the total capital is $23,157,705. The additional taxes demanded and paid on the latter basis constitute the matter in dispute. It thus appears that on the taxpayer's own figures, if the statute is applied according to its terms, there is no overpayment. But the protest stated and the petition alleges that the capital was invested and used in various ways. There were lands, buildings and machinery aggregating about $200,000,000. Inventories, cash, and accounts receivable (which may be considered working capital) aggregated some $250,000,000. There were United States and State and municipal securities put at $79,000,000,

and other smaller items. The investments returned as in Texas were about $1,168,000 in land and buildings; power plant $46,000; inventory, $1,012,000; accounts receivable $389,603, besides smaller items. Considering all the investments and their actual location it is argued that the formula of the Texas statute leads to absurd results, and that if a similar tax were levied in Michigan where sales are relatively small but where most of the assets are and most of the activity of the Company occurs, the result would be out of all fair proportion.

We do not think this argument controlling. This is not a tax on property. Each State, Michigan included, may tax all property having an actual or business situs therein. In addition each State in which this Company does business may exact an excise tax on that privilege. Texas has done so. The tax is non-discriminatory, applying alike to domestic and foreign corporations. It is not prohibitory, being in this case, without penalty, $7,247 on $34,272,000 of business done, or less than two ten-thousandths of one per cent. It is conceded that it might validly have been laid as a direct percentage on the business done. The objection is to the formula by which the tax is estimated. That it is gradu- [fol. 60] ated according to the capital strength of the corporation, which is its business potency, we held in the McCallum case to be not arbitrary. The holding is supported by the recent case of Great Atlantic & Pacific Tea Co. vs. Grosjean, 301 U. S. 412. When business is done also in other states, so that the business potency inherent in the capital is thus divided, it is not arbitrary to apportion the capital which is to measure the tax in proportion to the income realized in the taxing State. Nor do we think the fact that manufacture in another State of the thing sold renders the measure of the tax unreasonable. The object of the whole corporate enterprise is to make money. The corporation has made none by manufacture until it sells the product. If it chooses to sell in Texas, and extract cash from Texas, with the great advantage that manufacturing its own wares gives in competition with those who do not manufacture, it is not unreasonable to regard the potency of the capital used in manufacture as following proportionately the goods offered for sale in Texas. And it must be remembered that in this case part of the manufacture occurs in Texas. The machines are assembled and finished there. If it be prac-

ticable to separate the manufacturing from the selling activities, and the manufacturing activities in Texas from those elsewhere, this petition affords no data to do it. The value of the property as located in the several States would not be a reasonable basis of apportionment. Under such a basis this Company could manufacture wholly in another State, and sell its cars in Texas without any local investment and pay no tax there for the very valuable sales privilege. It is more reasonable to do as the Texas statute has done, to consider that in making sales and realizing income in Texas all the capital the seller has used in preparing the goods for sale has contributed to the result. The argument is made that a subsidiary corporation with but [fol. 61] little capital might be used to make the sales and thus limit the tax. In such a case the subsidiary might be held a mere agent to sell. But if that plan could be successful, it is no answer to the taxation of the parent company so long as it itself continues to sell its machines in Texas.

It is further argued that the United States bonds and stocks in foreign corporations owned by the taxpayer cannot reasonably be included in capital contributing to sales in Texas The presumption is that all the property of a business corporation is useful in its business. It should not have it otherwise. The Ford Motor Company has no business except the making and selling of cars. The securities can readily be used as a means of raising cash for working capital. What the foreign stocks are is not shown. If they have no relation to the business of making and selling cars the petitioner should have made the fact appear.

We find no basis for the contention that this tax on the privilege of doing a local business in Texas, measured in the way it is measured, taxes or otherwise burdens interstate commerce. For the more goods the taxpayer sells in interstate commerce, the less taxes it will owe in Texas.

Cases cited on the taxation of income such as Hans Rees Sons vs. North Carolina, 283 U. S. 123, are irrelevant. Wallace vs. Hines, 253 U. S. 66, would have been in point if the court had held the North Dakota excise tax law invalid in its general application. It held void only an exceptional phase of it which put upon railroads a peculiar method of mileage apportionment of capital between the States in which they did business, which was thought arbitrary. Had the apportionment for railroads been like that for other

corporations, on the basis of business done, as here, we apprehend the result would have been otherwise. Compare [fol. 62] Bass, Ratcliff & Gretton vs. State Tax Commission, 266 U. S. 271.

Judgment affirmed.

[fol. 63] JUDGMENT

Extract from the Minutes of December 15, 1938

No. 8664

FORD MOTOR COMPANY, a Corporation,

versus

EDWARD CLARK, Secretary of State of the State of Texas, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Ford Motor Company, a corporation, and the surety on the appeal bond herein, United States Guarantee Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 64] CLERK'S CERTIFICATE

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATE OF AMERICA:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 55 to 63 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for

the Fifth Circuit, in a certain cause in said Court, numbered 8664, wherein Ford Motor Company, a corporation, is appellant, and Edward Clark, Secretary of State of the State of Texas, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 54 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in th Fifth Circuit, this 27th day of February, A. D. 1939.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,233. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 748. Ford Motor Company, Petitioner, vs. Edward Clark, Secretary of State of the State of Texas, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 15, 1939. Term No. 748, O. T., 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 748

FORD MOTOR COMPANY,

Petitioner,

vs.

EDWARD CLARK, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GAIUS G. GANNON,
PALMER HUTCHESON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 748

FORD MOTOR COMPANY,

Petitioner,

vs.

EDWARD CLARK, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petitioner, Ford Motor Company, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to hear this cause and to review the decision of the Circuit Court of Appeals in affirming the judgment of the United States District Court for the Western District of Texas. Petitioner respectfully shows this Honorable Court:

1.

Summary Statement of the Matter Involved.

Since the case went off below on general demurrer (R. 34), the following facts, set up in the amended petition (R. 2), must be taken as true:

In addition to a long term permit fee, Texas requires of corporations an annual franchise tax for the privilege of doing an intrastate business. The tax is laid on capital employed in the business at the rate of 60¢ per thousand for the first million, and 30¢ per thousand for all additional. When the corporation, domestic or foreign, does business in more than one State, the corporation's total capital, wherever located, is allocated to Texas for franchise tax purposes in the proportion that the receipts from Texas business bear to total receipts from all business wherever done. (Art. 7084-85, R. S., 1925, as amended by the Acts of 1931, p. 441.)

The tax is computed on the information required of corporations by Articles 7087 and 7089, R. S., 1925.

Petitioner is a Delaware corporation but has its business domicile in Michigan. It holds a long-term permit to transact business in Texas. Its business is the manufacture and sale of automobiles and parts therefor.

For the taxable year in controversy, petitioner employed in Texas and in connection with its Texas business only $3,079,417.96 of its total capital, but the statute allocated to Texas, as taxable capital for the privilege of doing an intrastate Texas business, $23,157,705.95.

This disparity results largely from the following: (1) Petitioner maintains large and valuable plants in Michigan, where the parts for its motor vehicles are manufactured. These parts are then shipped to Texas and other States, where they are assembled into automobiles and sold. With respect to Texas sales, there are no gross receipts from the Michigan manufacturing activity until the finished product is sold in intrastate commerce. Then the sum total of the results of petitioner's unitary activity, taking place in several States, appears as gross receipts from Texas sales. (2) Petitioner has large investments in stocks of corporations foreign to Texas and owns large amounts of bonds,

notes, mortgages, United States securities and miscellaneous investments. None of this property is located in Texas or used in connection with petitioner's Texas business, but when the Texas formula is applied to this capital, a large part of it is arbitrarily allocated to Texas.

For the period in dispute, petitioner paid its Texas franchise tax, and certain penalties, based on capital assignable to Texas business as allocated by the statutory formula, but under protest to the extent, as claimed by petitioner, that the tax as thus computed fell on petitioner's property outside of Texas and not used by it in connection with its Texas business.

This suit was brought to recover the protest payment. The action is authorized under Texas law. (Acts of 1933, p. 637.)

The Honorable District Court rendered judgment on general demurrer in favor of respondents (R. 34) and the Honorable Circuit Court of Appeals affirmed that judgment (R. 60).

Petitioner claimed

(a) That the disputed tax fell upon property beyond the jurisdiction of the State of Texas to tax, and thus deprived petitioner of its property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 16);

(b) That the disputed tax fell upon activities of the petitioner conducted wholly beyond the confines of the State of Texas and beyond the jurisdiction of the State to tax, and thus deprived petitioner of its property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 17);

(c) That as the disputed tax fell upon property beyond the jurisdiction of Texas to tax, and as that property was

used by petitioner in its interstate and foreign business, the tax was an unreasonable and arbitrary burden on interstate commerce, contrary to Article I, Section 8, of the Constitution of the United States (R. 16).

2.

Statement Disclosing Basis Upon Which it is Contended this Court has Jurisdiction.

Jurisdiction of this cause is conferred upon this Honorable Court by Judicial Code, Section 240, as amended; United States Code, Title 28, Sec. 347.

3.

Questions Presented.

Is the annual franchise tax, exacted by Texas of foreign corporations (Articles 7084-85, R. S., 1925, as amended by Acts of 1931, p. 441), constitutional as applied to petitioner for the taxable year May 1, 1936, to May 1, 1937, against petitioner's claims:

(1) That as applied to it the exaction deprives petitioner of its property, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that thereby Texas levies a tax upon activities and property beyond its jurisdiction to tax;

(2) That, as applied to petitioner, the exaction places an unreasonable and arbitrary burden upon petitioner's interstate and foreign business, contrary to the provisions of Article I, Section 8, of the Constitution of the United States.

4.

Reasons Relied on for the Allowance of the Writ.

The reasons relied on for the allowance of the writ are that the Circuit Court has decided important questions of

Federal law which have not been and should be settled by this Court, and that these questions have been decided in a way probably in conflict with the applicable decisions of this Court.

(1) The Circuit Court of Appeals holds in this case that Texas may graduate its annual franchise tax required of foreign corporations according to the *total* business potency of such corporations without regard to the use, actual or contemplated, of that potency in Texas business. That this may be done in the case of a long term permit fee has recently been settled by *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22. But in that case there is a strong intimation, if not a holding, that *annual* franchise taxes may not be exacted of foreign corporations in relation to total business potency without regard to the use, actual or contemplated, of that potency in intrastate business. In the cited case the court noticed and apparently approved such cases as *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and *Looney* v. *Crane Co.*, 245 U. S. 178, but distinguished them on the ground that they involved only short-term privilege taxes.

(2) In this case the Circuit Court of Appeals holds it is not arbitrary for Texas to apportion capital for franchise tax purposes in proportion to gross receipts realized in Texas. This holding ignores the fact that petitioner's manufacturing business conducted outside the State of Texas which contributes substantially to Texas sales produces no gross receipts except through sales of finished products in the several states in which petitioner does business. Thus the whole of gross receipts from Texas sales is allocated to Texas when fairness requires an apportionment of the receipts from these Texas sales as between Michigan manufacturing and Texas assembly and sales activities. But the statute allows for no such apportionment. This holding is probably in conflict with *James* v.

Dravo Contracting Co., 302 U. S. 134, where, under similar circumstances, West Virginia was denied the right to tax activities carried on without her territorial limits.

(3) The Circuit Court's holding that Texas may tax capital of petitioner used wholly in Michigan manufacturing activities on the sole ground that petitioner later assembles and sells the manufactured products in Texas is probably in conflict with *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, where it is said:

> "The fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state."

(4) The Circuit Court held that although the application of the statutory formula resulted in the allocation to Texas of capital employed in the Michigan manufacturing business, such allocation was not unconstitutional. This holding probably conflicts with the decisions of this Honorable Court in *Looney* v. *Crane Co.*, *supra*; *Western Union Telegraph Co.* v. *Kansas*, *supra*; *Wallace* v. *Hines*, 253 U. S. 66, and *Fargo* v. *Hart*, 193 U. S. 490.

(5) The Circuit Court of Appeals holds that the apportionment of the Texas statute is on a basis of "business done". With all due respect, this is thought to be wholly incorrect. "Business done" is not synonymous with "gross receipts from business done". As applied to petitioner an example of a statute apportioning capital for purposes of taxation on the basis of "business done", as distinguished from "gross receipts from business done", would be where

the statutory formula compared the value of the Michigan manufacturing activity with the value of the Texas assembly and sales activities.

The difficulty with the application of the Texas formula to petitioner's business is that petitioner realizes no gross receipts whatever from its Michigan manufacturing business as such so that if every State in which it does business were to apply the same formula as Texas all of its Michigan capital would be allocated outside of the state except to the extent that Michigan manufacturing activity is represented in actual cash sales of finished products in Michigan. For the year in question the application of the Texas formula in all of the States in which petitioner does business would result in there being allocated to States other than Michigan $336,305,703.12 of its total capital of $504,111,209.10 located in that State (R. 17, *et seq.*). A statutory formula which produces such a result cannot, it is submitted, be sustained under the decisions of this Honorable Court.

It will not do to say, as did the court below, that the existence of this large capital in Michigan in some undefined way adds to the value of the right to assemble and sell automobiles in Texas. A similar contention was made and rejected in *Fargo* v. *Hart, supra.*

Then, too, the statutory scheme of taxation is to measure the value of the Texas privilege solely in relation to capital employed in the exercise of that privilege. There is neither on the face nor in the spirit of the statute evidence of an attempt to measure the value of the Texas privilege in relation to the actual extent or money worth of the exercise of that privilege. That this is true appears conclusively from the fact that Texas tax is decreased or increased as extra State sales increase or decrease while gross receipts from Texas business remain stationary.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Hon-

orable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and to send to this Court on a day certain to be therein designated a full and complete transcript of the record and of the proceedings in the Circuit Court of Appeals in said cause, entitled Ford Motor Company, appellant, *vs.* Edward Clark, Secretary of State of the State of Texas, *et al.*, appellees, No. 8664 on its docket, to the end that said cause may be reviewed and determined by this Court, as provided by Section 240 of the Judicial Code, as amended, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provisions of the Judicial Code, and that on hearing before this Honorable Court the judgments of the District Court and of the Circuit Court of Appeals may be reversed by this Honorable Court and such relief granted as is appropriate to the cause.

FORD MOTOR COMPANY,
GAIUS G. GANNON,
By PALMER HUTCHESON,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 748

FORD MOTOR COMPANY,

Petitioner,

vs.

EDWARD CLARK, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinions in the Courts Below.

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals is reported in 100 Federal Reporter, 2nd Series, p. 515, and is to be found at page 55 of the Record.

II.

Jurisdiction.

Stated under Section 2 of the petition for certiorari.

The judgment and decree of the Honorable Circuit Court of Appeals for the Fifth Circuit at New Orleans to be re-

viewed is dated December 15, 1938 (R. 60), and this petition for certiorari is presented this March 15, 1939.

III.

Statement of the Case.

The judgment of the District Court, affirmed by the Circuit Court of Appeals, was rendered on general demurrer to plaintiff's petition. The case, therefore, is that stated in the trial petition in the District Court (R. 2, *et seq.*). In the interest of brevity and a ready understanding of the case the salient facts are summarized below.

The Texas franchise tax act, Articles 7084-85, R. S., 1925, as amended by the Acts of 1931, page 444, reads as follows:

> "ARTICLE 7084. Amount of Tax.—(a) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each one thousand dollars ($1000) or fractional part thereof; One dollar ($1) to one million dollars ($1,000,000), sixty cents (60¢); in excess of one million dollars ($1,000,000) thirty cents (30¢); provided that such tax shall not be less than ten dollars ($10) in the case of any corporation, including those without capital stock. * * * the tax shall be computed from the data contained in the reports required by Articles 7087 and 7089."

Article 7087 and Article 7089, Revised Civil Statutes of Texas, 1925, provide for the filing of reports by foreign cor-

porations with the Secretary of State between January 1st and March 15th of each year, on blanks furnished by the Secretary, showing the condition of the corporation on the last day of its preceding fiscal year which, in the case of plaintiff, coincides with the calendar year. The reports require information showing the cash value of all gross assets of the corporation, the amount of its authorized capital stock, the capital stock actually subscribed, and the amount paid in, the surplus and undivided profits or deficits, if any, the amount of mortgage, bonded and current indebtedness, the total gross receipts of the corporation from all sources, and the gross receipts from business done in Texas for the fiscal year preceding with detailed balance sheet and income and profit and loss statements, in such form as the Secretary of State may prescribe.

The principal business of Ford Motor Company, a Delaware corporation, is that of a manufacturer and vendor of automobiles and self-propelled motor vehicles and parts therefor (R. 6).

The company's fiscal year coincides with the calendar year (R. 6).

Petitioner's Texas business is conducted in the following way:

> "Petitioner owns and operates within the State of Texas assembly plants. No parts for the self-propelled motor vehicles sold by petitioner are manufactured at said assembly plants or at any other point within the State of Texas. All of said parts are manufactured at plants outside of the State of Texas, located for the most part in the State of Michigan. The manufactured parts are shipped from Michigan and other points outside of the State of Texas to petitioner's assembly plants in Texas, and are there assembled or put together into finished, self-propelled motor vehicles. The assembled vehicles are then sold in intrastate commerce to various dealers, who in turn sell said vehicles to the public. Some of the vehicles assembled at the

Texas plants are sold in interstate commerce, but by far the biggest part thereof is sold, as aforesaid, to Texas dealers in intrastate commerce'' (R. 6-7).

The following statistical data in respect to petitioner's business for the fiscal year 1935 is material. It appears at various places in the trial petition (R. 2, *et seq.*), but for convenience is tabulated as follows:

Gross receipts from business done in Texas	$34,272,887.72
Gross receipts from business done outside of Texas	854,072,087.75
Total gross receipts from all business done both in and out of Texas	888,344,975.47
Ratio of receipts from business done in Texas to total gross receipts	3.8580606%
Total taxable capital at December 31, 1935	600,242,151.57
Capital allocated to Texas by statutory formula (3.8580606% of $600,242,151.57)	23,157,705.95
Full true value of assets located in Texas or used or devoted to Texas business at December 31, 1935	3,079,417.96
Excess capital allocated by statutory formula over full true actual value of assets located in or used in or devoted to Texas business at December 31, 1935	20,078,287.99

Ford Motor Company has large investments in stocks of corporations foreign to Texas and owns large amounts of bonds, mortgages, notes, United States securities, municipal and state securities, and miscellaneous investments. None of this property is used, held or located in Texas or in connection with petitioner's Texas business (R. 12).

The Texas statutory formula, when applied to Michigan business, results in allocating out of Michigan into other States $336,305,703.12 of a total of $572,397,253.13 of Michigan assets (Exhibit X to the petition, immediately following Exhibit A, which follows page 26 of the Record). Further data demonstrating how the statutory formula, when

applied to Michigan business, operates to create a deficit in Michigan capital, said capital being neither in Texas nor used in connection with petitioner's Texas business, appears in Exhibit Y to the petition (R. 29).

Although petitioner's capital investment falls into fifteen separate classifications, there is neither located in Texas nor used by petitioner in, or in connection with, its Texas operation, any capital in eight of those fifteen classifications (Exhibit A to the petition, R. following p. 26).

Petitioner's pleadings adequately raise the Federal questions set out under "Questions Presented" in the petition for certiorari. See paragraphs XXII and XXIII of the amended petition (R. 16, *et seq.*).

IV.

Specifications of Error.

1.

The Honorable Circuit Court of Appeals erred in holding that Texas may graduate the annual franchise taxes required by it of foreign corporations according to the business potency of such corporations, without regard to the use, actual or contemplated, of that potency in Texas business during the year for which the tax is collected.

2.

The Circuit Court of Appeals erred in holding that it is not arbitrary for Texas to apportion petitioner's total capital to Texas for franchise tax purposes in proportion to gross receipts realized from Texas business, when none of the unitary activities of petitioner which take place in several States and combine to make Texas sales possible are reflected in total gross receipts except through intrastate sales in Texas.

3.

The Circuit Court of Appeals erred in holding that Texas may tax petitioner's capital located beyond the confines of the State and used wholly in Michigan manufacturing activities on the sole ground that petitioner later assembles and sells the manufactured products in Texas.

4.

The Circuit Court of Appeals erred in holding Texas may constitutionally measure the value of the annual privilege extended foreign corporations to transact business in Texas in relation to capital employed and activities conducted by such corporation beyond the confines of the State, it affirmatively appearing that such capital and activities do not add in any legal sense to the value of the Texas privilege.

5.

The Circuit Court of Appeals erred in holding that the Texas Statute, Articles 7084-85, R. S., 1925, as amended, apportions capital on the basis of business done.

6.

The Circuit Court of Appeals erred in holding that Articles 7084-85, R. S., 1925, as amended, as applied to the petitioner, for the taxable year in controversy, does not result in the State of Texas levying a tax on capital and assets beyond the power of the State of Texas to tax contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7.

The Circuit Court of Appeals erred in holding that Articles 7084-85, R. S., 1925, as amended, as applied to peti-

tioner, for the taxable year in controversy, does not result in the State of Texas levying a tax on activities of petitioner beyond the power of the State of Texas to tax contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

8.

The Circuit Court of Appeals erred in holding that petitioner's first amended original petition failed to allege sufficient facts to show that, as applied to petitioner, Articles 7084-85, R. S., 1925, as amended, applicable to foreign corporations, operates as an unreasonable and arbitrary burden upon interstate and foreign commerce, in violation of Article I, Section 8, of the Constitution of the United States.

V.

ARGUMENT.

Summary of the Argument.

Point A.

The statute, as applied to petitioner, taxes petitioner's capital beyond the jurisdiction of the State of Texas to tax.

Point B.

The statute, as applied to petitioner, taxes petitioner's activities beyond the jurisdiction of the State of Texas to tax.

Point C.

The statute, as applied to petitioner, taxes petitioner's property beyond the jurisdiction of the State of Texas to tax, and as that property is used by petitioner in its interstate and foreign business, the statute lays an unreasonable and arbitrary burden upon petitioner's interstate and foreign business.

Points A and B.

These points are closely related and will be treated together.

It is well established that a state has no jurisdiction to tax property or activities of foreign corporations beyond its boundaries, *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane Co.*, 245 U. S. 178; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, and that the only reason for allowing a State to look beyond its borders when taxing property or activities of a foreign corporation is that it may get *the true value of things within it*, *Wallace* v. *Hines*, 253 U. S. 66. The principle has been given practical application in the case of unitary corporations owning property and conducting activities partly within and partly without a State, *James* v. *Dravo Contracting Co.*, *supra*; *Hans Rees' Sons* v. *North Carolina*, *supra*.

It is also well established that the introduction of an extremely complicated method for calculating the amount of an exaction does not change the nature or mitigate the burden of the tax, *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203; that a formula may be fair on its face but unconstitutional in its application to a particular taxpayer, *Hans Rees' Sons* v. *North Carolina*, *supra*; *Norfolk & Western Railway Co.* v. *North Carolina*, 297 U. S. 682, and that when constitutional objections are urged to a method or basis of taxation the *amount* demanded is unimportant if the method or basis of taxation has no legitimate foundation, *Alpha Portland Cement Co.* v. *Massachusetts*, *supra*; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

What is the practical operation of the Texas franchise tax act on petitioner's extra State capital and activities?

The company owns and operates large and valuable manufacturing plants in the State of Michigan. Parts for its

motor cars are manufactured almost entirely in that State. These parts are then shipped to Texas where they are assembled into finished products and sold in intrastate commerce. No gross receipts are derived from any part of the unitary activities taking place partly within and partly without Texas until an intrastate sale occurs. But gross receipts from such sales represent the value not alone of the Texas assembly and sales operation but as well, and in a substantial measure, the value of the Michigan manufacturing business and the capital devoted to it. In fact that business and capital contributes far more to the resultant gross receipts than do the Texas assembly and sales operations.

Thus by the device of allocating capital on a basis of "gross receipts from actual sales" rather than on a basis of "business done", Texas apportions to itself so far as it is represented in Texas sales the whole of the capital necessary to the conduct of the important manufacturing business carried on outside her boundaries. It was held under similar circumstances in *James* v. *Dravo Contracting Co.*, *supra*, where a tax was measured by gross receipts, that:

> "West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State *and an apportionment would in any event be necessary to limit the tax accordingly.*"

The Circuit Court placed much reliance on the fact that the tax is one on a local privilege. However we are not concerned with the nature of the tax but with its constitutional operation as applied to one situated as is petitioner. True it is that the tax is on a local privilege; but it is equally true the taxing scheme is to measure the value of that privilege in relation to capital actually employed in the prosecution of

the local privilege, *Investment Securities Co. of Texas* v. *Meharg*, 115 Tex. 441, where it is said:

> "Thus the franchise tax levied on such corporations must have for its basis total gross assets employed by the corporation in the transaction of its business in Texas."

The question here is not the right of Texas to apportion capital on some fair basis. It is rather, does the statute, as applied to one situated as petitioner, actually carry out the legislative scheme of taxation within permissible limits.

Wallace v. *Hines*, *supra*, involved a precisely similar question. There North Dakota exacted a franchise privilege tax of railroad corporations doing business within the State. As does the Texas tax here involved, North Dakota's levy fell upon capital at a definite rate per unit. The statute provided for apportionment between States where corporations were engaged in business in more than one State. In the case of railroads apportionment was on a basis of mileage within and without the State. The question ruled in *Wallace* v. *Hines* was the fairness, in the light of the legislative scheme of taxation, of the method of apportionment as applied to a particular taxpayer. That is the question involved here. The North Dakota Act as applied to the taxpayer there involved was held unconstitutional for the sole reason that the mileage method of allocation adopted by North Dakota did not fairly approximate the railroad's capital actually used in North Dakota business. Here the gross receipts method of allocation tested by the legislative scheme of taxation inaccurately and unfairly apportions to Texas almost eight times more capital than petitioner uses in its Texas business. Should the other States in which petitioner does business adopt similar statutes practically the whole of petitioner's Michigan capital would be allocated out of Michigan and to these other

States. Of a total of $23,157,705.95 allocated by the statute to Texas $18,907,033.15 is directly traceable to petitioner's Michigan plant and to its investments there. None of this property is in any true sense even remotely related to the petitioner's Texas assembly and sales business. The Circuit Court seems to have fallen into four distinct errors:

(1) It ruled the case on the authority of *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412. In the light of the scheme of taxation evidenced by the Texas statute which is based upon capital about to be employed in business there is no room for the application of the principles announced in that case.

(2) It ignored the fact that capital about to be used in Texas business is the sole statutory measure of the value of the privilege taxed. Having done so, the court proceeded to decide the fairness of the *amount* of the tax.

(3) It misconceived the statute as one providing for apportionment on the basis of "business done" rather than on the basis of "gross receipts from business done". Having done so, it held that the burden rested upon petitioner to determine the relative value of its intra and extra State activities in relation to gross sales. Such a separation could be given no legal effect under a scheme of taxation, such as that contained in the statute here, which falls alone on capital and does not concern itself with the value or extent of activities carried on with that capital. Petitioner can meet this burden only when the State shall have amended the statute to change its scheme of taxation so as to let the incidence of the tax fall upon the extent and value of the exercise of the privilege rather than upon capital.

(4) It held in effect that Texas may tax the whole of the capital devoted to a unitary activity consisting of the manu-

facture, assembly, and sale of motor cars regardless of the fact that the unitary activity takes place in several States. Even if, in the face of the statute, it be conceded that the court rightly construed the legislative scheme of taxation, this holding is insupportable. Texas may not tax capital devoted to a Michigan manufacturing business on the sole ground that the manufactured product is later shipped to and sold within the State of Texas. *James* v. *Dravo Contracting Co., supra.* The facts differ radically from those involved in *Great Atlantic & Pacific Tea Co.* v. *Grosjean, supra,* where extra State capital and activities added in a clear, direct, and unmistakable way to the value of an activity carried on within the State. Compare *Western Union Telegraph Co.* v. *Kansas, supra,* and *Looney* v. *Crane Co., supra.*

The Circuit Court says:

> "The value of the property as located in the several states would not be a reasonable basis of apportionment. Under such a basis this company could manufacture wholly in another state and sell its cars in Texas without any local investment and pay no taxes there for the very valuable sales privilege."

This statement is not impressive when one considers that under the statute the company could manufacture wholly in Texas and sell its entire output in other States and still pay no tax for the very valuable manufacturing privilege. Both considerations prove too much. Plainly Texas has adopted a formula which, when applied to many unitary corporations conducting activities in several States, will fairly apportion capital between States.

But this is not to say it does so in the case of petitioner and others similarly situated. *Hans Rees' Sons* v. *North Carolina, supra; Norfolk & Western Railway Co.* v. *North Carolina, supra.*

The Circuit Court places much reliance upon certain *dicta* contained in *Southern Realty Co.* v. *McCallum*, 65 F. (2d) 934. It was there said:

> "When the corporation is to do business in other states also, avoidance of a trespass on interstate commerce or on that done beyond the territorial jurisdiction of the taxing state, is secured by apportioning the business potency of the corporation represented by its business capital according to the business actually done during the preceding calendar year in the taxing state as indicated by gross receipts, compared with all its business everywhere."

To the extent that the quoted language may be said to justify the actual results of the Texas Statute upon petitioner it is squarely in conflict with what has been said by this Court in similar cases. Compare *Wallace* v. *Hines, supra; Hans Rees' Sons* v. *North Carolina, supra,* and *James* v. *Dravo Contracting Co., supra.*

In short, the case comes to this: Texas has adopted a statute which, when applied to a unitary business carried on in several States such as that of petitioner, allocates to Texas the entire activity and property of the business wherever situated to the extent that that unitary activity and property results in sales in Texas.

The situation would be plainer, although no different, if Ford Motor Company sold all of its Michigan manufactured products in Texas. In that event its entire capital and business would be allocated to Texas by the statute.

It is clearly alleged in the petition that much of petitioner's property consisting of patents, stocks of foreign corporations, bonds, mortgages, notes, United States and municipal and State securities is neither in Texas nor used by the petitioner in connection with its Texas business but the Circuit Court suggests that this property in some indefinable way adds to the value of the Texas privilege. The

argument was made, thoroughly considered, and rejected in *Fargo* v. *Hart*. 193 U. S. 490.

Point C.

This point is largely covered by the argument under Points A and B upon which it depends. It is clearly alleged in the petition that petitioner's Michigan capital is devoted in a substantial part to petitioner's interstate and foreign business. Obviously if the result of the Texas Statute is to place an unsupportable exaction on petitioner's extra State capital devoted in substantial part to interstate and foreign business the statute violates the commerce clause.

Conclusion.

It is respectfully submitted that this case calls for the exercise by this Court of its supervisory power. The questions involved are important and of far reaching application. Every manufacturing corporation which manufactures outside of Texas and sells within Texas is unconstitutionally affected by the statute. We, therefore, respectfully pray that this Court forthwith review the decision of the United States Circuit Court of Appeals for the Fifth Circuit and the decision of the District Court of the United States for the Western District of Texas.

GAIUS G. GANNON,
PALMER HUTCHESON,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 17.

FORD MOTOR COMPANY, *Petitioner*,

vs.

TOM L. BEAUCHAMP, Secretary of State of the State of Texas, Et Al., *Respondents*.

REPLY BRIEF OF PETITIONER.

GAIUS G. GANNON,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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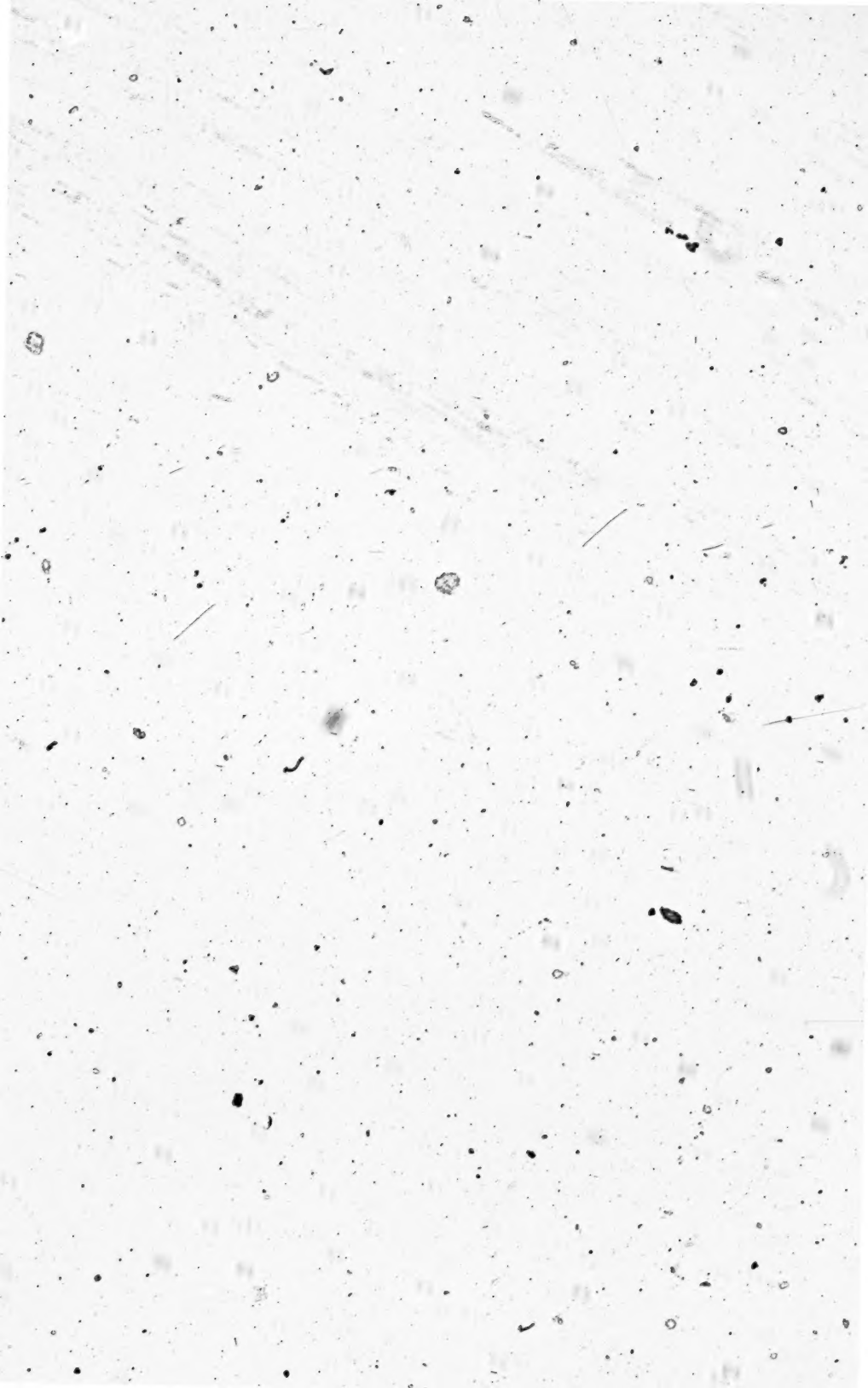
CASES CITED.



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REPLY BRIEF OF PETITIONER.

Petitioner's position has been fully though concisely stated in the petition for certiorari and in its supporting brief. There will be no attempt to enlarge upon it in this reply, except to the extent that what is said in Respondents' brief is thought to require specific statement from petitioner.

1. Inaccuracies in Respondents' Brief.

(a) Respondents at page 6 of their brief say: "Petitioner enclosed with its report to the Secretary of State its certified check for $1,224.00, which it asserted was the amount it owed as its franchise tax for the year 1936, and

which amount was arrived at by multiplying 3.858000 per cent of the total of all of its business done during the year 1935 into the amount of its capital which was invested by it in the State of Texas, that is, into $3,079,417.96. (See Paragraph 18 of Plaintiff's Petition, Tr. p. 8.)" Respondents labor under a misapprehension of the allegations of Section XVIII of the petition. It is clearly alleged in that section (R. 10, L. 11) "the sum of $1,224.00 which was heretofore paid you is the amount of our franchise tax computed on said figure of $3,079,417.96 * * *." It is thus seen that petitioner's unprotested payment was based on the full book value of all of its property located in Texas. In other parts of the petition it is fully alleged that this property represents all of petitioner's property either located or held in Texas or used by it in connection with Texas operations.

(b) The word "nor" appearing at page 8 of Respondents' brief in the quotation from Section XXII of the petition is in error. The word actually used in the petition is "for". We point this out as the substitution of the word "nor" for the word "for" leaves the quoted allegation unintelligible.

(c) On page 9 of Respondents' brief it is said "there is no allegation in the plaintiff's petition that $34,272,887.72 gross receipts from plaintiff's business done in Texas for the year in question was in any part derived from other than intra-state business."

If by this Respondents assume there is no allegation to show that the $34,272,887.72 gross receipts realized from intra-state sales are not in part attributable to property and activities conducted by petitioner beyond the state then Respondents are clearly in error.

Every fact which can possibly throw any light upon petitioner's total situation in regard to its intra and extra state activities is plead in detail. The way and manner in which the business is conducted is shown. It is alleged that petitioner's Texas business consists exclusively in the assembly and sale of self propelled motor vehicles and parts therefor.

The situs of manufacture and assembly as well as the situs of sale of these self-propelled motor vehicles and parts therefor is plead in detail as is also the value and situs of all of appellants property which is used in connection with its unitary activity. It is shown (R. 20A) that petitioner's capital investment falls in fifteen separate classifications but that in the conduct of its Texas business there is neither located in Texas nor used in or devoted to its Texas operations capital falling in eight of those classifications. The value of petitioner's total capital not used in or in connection with its Texas operations may be arrived at from what is plead by deducting the actual net book value of its actual assets in Texas from the sum total $681,549,928.71 which is plead as the net book value of petitioner's total assets. In the light of the facts as plead it is claimed that the tax demanded "is a tax upon property of ours neither located nor used within the State of Texas and is a tax upon our business transacted outside of the State of Texas." See petitioner's letter of protest to the Secretary of State (R. 19) in connection with the allegation in Section XXIV of the petition (R. 14) that the facts and figures claimed by plaintiff to exist with respect to it and its business in said letter of protest do all and singular in truth and in fact exist as set out in said letter and as shown by the accompanying Exhibit A (R. 20A) attached thereto.

2. The Legislative Scheme of Taxation.

Petitioner has heretofore cited *Investment Securities Co. v. Meharg*, 115 Texas 441, where the Supreme Court of Texas said of the tax under consideration "thus the franchise tax levied on such corporations must have for its basis total gross assets employed by the corporation in the transactions of its business in Texas." Respondents cite *United North and South Development Co. v. Heath, Secretary of State*, 78 S. W. 2d 650, Austin Court of Civil Appeals, writ of error refused. It is not thought that the opinion of the Austin Court is in conflict with that of the Supreme

Court in *Investment Securities Co.* v. *Meharg.* In the Heath case it is said "since such tax is payable in advance the State may in computing such tax, look to the property owned by the corporation and available to it, for use during the ensuing year in carrying on the business. Such was clearly we think the legislative intent." All of the property of the corporation involved in the *Heath* case, as was true of that involved in *Investment Securities Co. of Texas* v. *Meharg*, was located within the State of Texas. It is thought that both courts construe the tax as one measurable solely by capital about to be employed in the prosecution of the local business.

The apportionment formula first came into the statute by an amendment in 1917. It was occasioned by the attack made upon the old law in *Looney* v. *Crane Co.*, 245 U. S. 178. The amendment provided in terms that the fees should be calculated and based upon "capital stock assignable to the Texas business," as allocated by the statutory formula. The amendment of 1917 was incorporated practically in haec verba in the codification of 1925. The present law which is an amendment of the 1925 Code changes the statutory language slightly but only in the interest of brevity and not in a way to indicate any change in legislative intent in regard to the measure of the tax which is still "based upon that portion of the outstanding capital stock, surplus and undivided profits * * *."

Though at one point in their brief Respondents seemed to agree that the measure of the tax is solely capital about to be employed in the prosecution of the local business (page 23 *et seq.*) still at another point in their brief they say the statute "bears inherent evidence that it was carefully and intelligently conceived, so as to bear equally as nearly as possible upon all corporations according to the value of their *business potency* while exercising the privilege of carrying on the business within the state."

In the light of *Investment Securities Company of Texas* v. *Meharg* it is submitted that total business potency in the

Allocation to Texas
Of Capital and Surplus by Ratio of Gross Receipts
Under Varying Conditions

	Total Gross Receipts Entire Company (Col. 1)	Gross Receipts In Texas (Col. 2)	Ratio of Gross Receipts in Texas to Total Gross Receipts (Col. 3)	CAPITAL AND SURPLUS ALLOCATED TO TEXAS BY GROSS RECEIPTS: When Capital and Surplus Is $200,000,000 (Col. 4)	When Capital and Surplus Is $400,000,000 (Col. 5)	When Capital and Surplus Is $600,242,151 (Col. 6)	When Capital and Surplus Is $800,000,000 (Col. 7)
Corporation L	$ 400,000,000.00	$ 7,716,121.20	.019290303	$ 3,858,060.60	$ 7,716,121.20	$11,578,852.98	$15,432,242.40
Corporation M	800,000,000.00	15,432,242.40	.019290303	3,858,060.60	7,716,121.20	11,578,852.98	15,432,242.40
Corporation N	1,200,000,000.00	23,148,363.60	.019290303	3,858,060.60	7,716,121.20	11,578,852.98	15,432,242.40
Corporation O	1,776,689,950.94	34,272,887.72	.019290303	3,858,060.60	7,716,121.20	11,578,852.98	15,432,242.40
Corporation P	2,000,000,000.00	38,580,606.00	.019290303	3,858,060.60	7,716,121.20	11,578,852.98	15,432,242.40
Corporation Q	200,000,000.00	7,716,121.20	.038580606	7,716,121.20	14,432,242.40	23,157,705.95	30,864,484.80
Corporation R	400,000,000.00	15,432,242.40	.038580606	7,716,121.20	14,432,242.40	23,157,705.95	30,864,484.80
Corporation S	600,000,000.00	23,148,363.60	.038580606	7,716,121.20	14,432,242.40	23,157,705.95	30,864,484.80
Corporation T	888,344,975.47	34,272,887.72	.038580606	7,716,121.20	14,432,242.40	23,157,705.95	30,864,484.80
Corporation U	1,000,000,000.00	38,580,606.00	.038580606	7,716,121.20	14,432,242.40	23,157,705.95	30,864,484.80
Corporation V	133,333,333.34	7,716,121.20	.057870909	11,574,181.80	23,148,363.60	34,736,558.93	46,296,727.20
Corporation W	266,666,666.67	15,432,242.40	.057870909	11,574,181.80	23,148,363.60	34,736,558.93	46,296,727.20
Corporation X	400,000,000.00	23,148,363.60	.057870909	11,574,181.80	23,148,363.60	34,736,558.93	46,296,727.20
Corporation Y	592,229,983.65	34,272,887.72	.057870909	11,574,181.80	23,148,363.60	34,736,558.93	46,296,727.20
Corporation Z	666,666,666.67	38,580,606.00	.057870909	11,574,181.80	23,148,363.60	34,736,558.93	46,296,727.20

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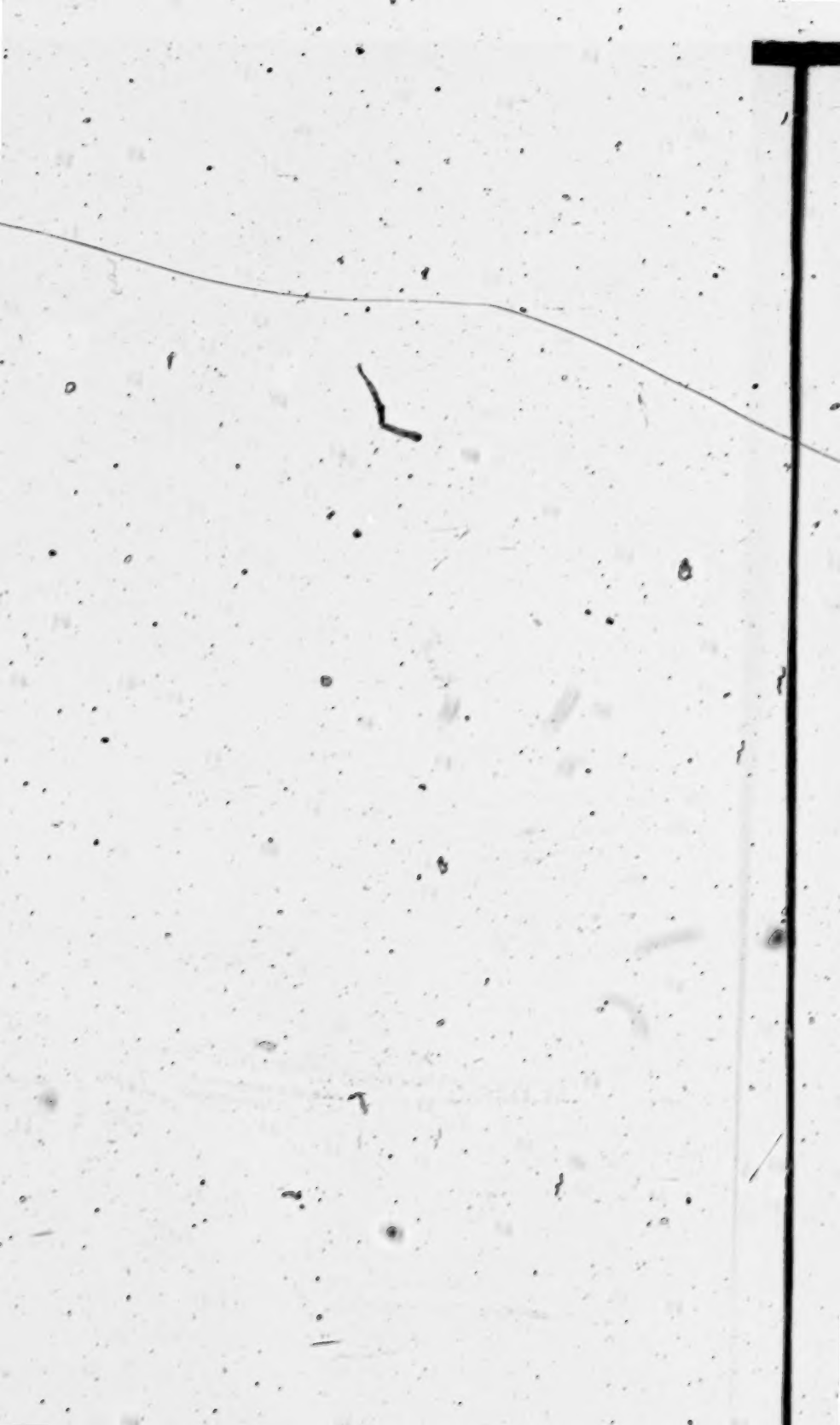

sense that term is used in such cases as *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22, is in no proper sense a factor in the legislative scheme of taxation.

The measure of the tax is either capital about to be employed in Texas business, or gross receipts from intra-state sales or services, or some inscrutible combination of the two. Viewed as a tax measured otherwise than by capital alone the statute, in practical operation, reaches strange results. We append at this point a table of computations to show allocations to Texas of capital and surplus by the single factor of ratio of gross receipts under varying conditions. From this table it is readily seen that the tax is not increased in direct relation to the volume of intra-state receipts but that it is solely dependent upon the *ratio* of intra-state receipts to total receipts. Thus, a corporation with total capital and surplus of $200,000,000, doing business both in and out of the state; has allocated to Texas of its total capital $3,858,060.60 when gross receipts from Texas amount to $7,716,121.20, total gross receipts amounting to $400,000,000, the ratio being .019290303. The same corporation may increase its Texas receipts by five fold to $38,580,606 without increase in allocation of capital to Texas provided only that at the same time it increases its total sales to $2,000,000,000 so as to preserve the ratio of .019290303. Thus, the Texas tax is the same in the case of a business whose Texas gross receipts are in excess of $38,000,000 as in the case of a business whose Texas gross receipts are under $8,000,000, provided only that extra-state and inter-state gross receipts are increased in proportion.

It is submitted that reasonably construed the statute cannot be viewed as measuring the tax in relation to the amount of Texas sales, as the statutory formula, in practical operation, produces an increase or decrease in capital allocable to Texas not on a corresponding increase or decrease in Texas receipts but solely in relation to the *ratio* of those receipts to total gross receipts from all business

wherever done. We assume without discussion that the *ratio* in itself is unimportant and may not be said to relate, even remotely to the value of the taxed privilege.

Respondents' contentions therefore we think must be examined in the light of a tax whose incidence is on a privilege but which values that privilege solely in relation to capital about to be employed in its exercise.

3. Respondents' Second Counter Proposition to Petitioner's Specifications of Error.

By this counter proposition respondents frankly admit that the result of the Texas statute in its application to petitioner is to measure the value of a purely intra-state privilege in relation to capital employed and activities conducted by petitioner beyond the confines of the State. Respondents would justify this sweep of the statute on the grounds that this extra-state property and these extra-state activities are considered only to the extent that they enhance the value of what is done in Texas. But under the allegation of the petition what is done or used without the state adds nothing to the value of what is done within. It seems to us that respondents follow the Circuit Court of Appeals in an argument which has been repudiated by this Court in *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123.

In that case the Supreme Court of North Carolina had ruled in respect to corporations conducting a unitary business in several states that any of the states were justified as viewing what was done within its borders as "the hub from which the spokes of the entire wheel radiate to the outer rim" and in refusing to lop off as foreign to it "certain elements of the business constituting a single unit in order to place the income beyond the taxing jurisdiction of this state." The following language from this Court's opinion on appeal from the judgment of the Supreme Court of North Carolina is directly applicable:

> "Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is

ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits. The difficulty of making an exact apportionment is apparent and hence, when the State has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State. As was said in the *Bass* case with regard to 'the unitary business of manufacturing and selling ale' which began with manufacturing in England and ended in sales in New York, that State 'was justified in attributing to New York its proportion of the profits earned by the Company from such unitary business'. And the principle that was recognized in *National Leather Co.* v. *Massachusetts, supra,* was that a tax could lawfully be imposed upon a foreign corporation with respect to 'the proportionate part of its total net income which is attributable to the business carried on within the State.' When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

It was said in *Wallace* v. *Hines,* 253 U. S. 66, that a state when establishing tax values is justified in looking to activities and property beyond its borders only when those activities and that property may be seen to add in a clear and unmistakable way to the value of what lies or is done within. We have heretofore pointed out that the result of the Texas

formula which considers only "gross receipts" from business done as distinguished from "business done" is to apportion to Texas pro tanto *the whole* of petitioner's unitary activity resulting in intra-state sales. Compare *James* v. *Dravo Contracting Co.*, 302 U. S. 134. Even if the legislative scheme of taxation were—as it is not—to allocate, in part, to Texas out of state property, thought to be remotely and indirectly related to Texas activity, on the theory that that property adds, in some degree, to the value of the local privilege, still in any event an apportionment is required. Otherwise, all extra-state activity entering into the unitary scheme is denied effect. But the statute permits of no apportionment. Petitioner may not by valuing its extra-state activities, say in relation to net income, bring this value within the framework of a statute which allocates property solely on the basis of gross receipts.

If it is to be said that the Texas Act evidences an intention to value the local privilege, in part in relation to the amount of business done in Texas, as distinguished from capital employed in the business, then it seems to us it must be said with equal logic of the statute reviewed in *Wallace* v. *Hines*, 253 U. S. 66, that the legislative scheme there was to value the local privilege in relation, in part, to the number of miles of railway operated within the state. But no such suggestion was brought forward in the *North Dakota* case. It is submitted that, as was true of the factor of miles of railway operated within the State in the North Dakota statute, the sole function to the purposes of the Texas Act, of the factor of gross receipts from Texas business is to arrive at the amount of property employed in Texas business. If this view be correct then under the principles announced in this Court's prior cases, *Western Union* v. *Kansas*, 216 U. S. 1, *Looney* v. *Crane*, 245 U. S. 178, the effect of the Texas Act on petitioner is to subject petitioner's property beyond the confines of the state to unconstitutional taxation. Texas in looking beyond its borders to petitioner's Michigan manufacturing activity and

in allocating to itself all of the property there situated, to the extent that its use results in Texas sales, goes too far. In *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, extra-state capital and activities where permitted to be considered in valuing a local privilege but only to the extent as shown by the record in that case this extra-state property and activity added to the value of the local privilege. There is no room on the facts plead here for the application of the *Grosjean* case.

4. Respondents' Authorities.

In the interest of brevity we will notice only a few of the authorities cited by respondent.

Southern Realty Corporation, et al. v. *McCallum*, 65 Fed. 2d 934.

It is respectfully submitted that in the *McCallum* case the statute now in question was not attacked upon the same ground on which petitioner stands. It would serve no useful purpose to review the decision in detail. However, what was actually decided is manifest from the concluding part of the opinion where it is said: "It is true that a taxing statute may be valid in its general application, but unconstitutional in its operation on some particular person and evidence is receivable to show it. *Hans Rees' Sons* v. *North Carolina, Ex. Rel. Maxwell*, 283 U. S. 124, 51 S. Ct. 385, 75 L. Ed. 879. No such showing has in our judgment been made here." The *McCallum* case is not authority for the proposition that the statute under review is immune to attack in a proper case. On the contrary it appears to support the opposite view.

People Ex. Rel. v. *Bass*, 266 U. S. 271;
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113.

In view of what was said of these cases in *Hans Rees' Sons* v. *North Carolina*, *supra*, it is thought they have no

application here where it is unequivocally alleged that Texas allocates to itself *all* of the property used by petitioner in its unitary activities conducted in several states to the extent that those activities ultimately result in Texas sales.

International Shoe Company v. *Shartell*, 279 U. S. 429;
New York v. *Latrobe*, 279 U. S. 421.

As we read these companion cases they announce nothing in addition to what was decided in *Roberts and Schaefer Co.* v. *Emerson*, 271 U. S. 51. In all three cases the question was the right of the state to value non-par stock arbitrarily for franchise tax purposes. None of them involve a question of unjust and unreasonable apportionment which as we see it is the only thing at issue in the present case. We, therefore, are at a loss to understand respondent's statement at page 37 of their brief that "the Latrobe case negatives every proposition urged by petitioner against the Texas statute."

5. Respondents' Contention that Because the Amount of the Tax is Small in Relation to the Privilege Granted Petitioner Has No Standing to Complain.

Respondents urged in the Circuit Court with much effect the contention that as the amount of the tax was equivalent to only two ten-thousandths of one per cent (.0002%) of petitioner's gross receipts for the year in question the statute is not subject to attack. But there is no support in the decisions of this court for the view that an unconstitutional *method* of taxation will be allowed to stand because the *amount* of the tax is small. This is not a case where the results under the statute *approach* actuality. Here Texas allocates to itself approximately eight times as much capital as is actually used by petitioner in its Texas business. If what respondents really say is that de minimis applies,

then the answer is to be found in the statement of this court in *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, quoted with approval in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, where it was said of state taxes found to burden inter-state commerce and to violate the 14th Amendment because beyond the jurisdiction of the state to levy, that "the *amount* demanded is unimportant when there is no legitimate *basis* for the tax."

CONCLUSION.

In conclusion it is respectfully submitted that as applied to petitioner the tax in question works unconstitutional results.

Respectfully submitted,

GAIUS G. GANNON,
Counsel for Petitioner.

FILE COPY

NO. 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

FORD MOTOR COMPANY,
Petitioner

vs.

TOM L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.,
Respondents

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

The petitioner, Ford Motor Company, brought this suit against the Secretary of State, the Attorney General of Texas, and the State Treasurer to recover the sum of $7,529.25, which is that amount or portion of the state franchise tax for the year 1936 which it had paid to the State of Texas under protest.

Petitioner filed its suit at law in the District Court of the United States for the Western District of Texas, Austin Division. Suit was brought pursuant to the Acts of the Forty-Third Legislature, State of Texas, Chapter 214, page 637, known as

the Suspension Statute, which provides, in effect, that a franchise tax paid to the State of Texas under protest may be recovered back by a proper suit, if such tax has been illegally assessed and paid to the State.

As shown by the Texas statutes, and as disclosed by the petition of the Ford Motor Company, the tax in question is a franchise or privilege tax levied against petitioner as a corporation doing business in the State of Texas under a lawful permit theretofore granted to it, and by virtue of Articles 7084 and 7085, Revised Civil Statutes of the State of Texas, 1925, as amended by the Acts of the Forty-second Legislature, Chapter 265, p. 441. So much of this statute as provides for the assessment of such tax as is deemed pertinent is here quoted, to-wit:

> "(A) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following, based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each One Thousand Dollars ($1,000.00) or fractional part thereof; One

Dollar ($1.00) to One Million Dollars ($1,000,000.00), sixty cents (60c); in excess of One Million Dollars ($1,000,000.00), thirty cents (30c); provided that such tax shall not be less than Ten Dollars ($10.00) in the case of any corporation, including those without capital stock. Where a foreign corporation applying for a permit has heretofore done no business in Texas, such tax shall not be payable until the end of one year from the date of such permit, at which time the tax shall be computed according to first year's business; and, at the same time, such corporation shall also pay its tax in advance, based upon the first year's business, for the period from the end of the first year to and including May 1st following. In all other cases the tax shall be computed from the data contained in the reports required by Articles 7087 and 7089." Capital stock as applied to corporations without capital stock shall mean the net assets."

Article 7089, Revised Civil Statutes of Texas, 1925, as amended by the Acts of the Forty-second Legislature of the State of Texas, Chapter 265, Section 2, p. 441, provides that all corporations now required to pay an annual franchise tax shall, between January 1st and March 15th of each year, make a sworn report to the Secretary of State, on blanks furnished by that officer, showing the condition of such corporation on the first day of its preceding fiscal year. The further requirements of this statute are omitted, as the report so required by the statute was complied with by the Ford Motor Company, and its provisions are of no further concern in this cause.

Article 7091, Revised Civil Statutes of Texas, 1925, provides for a penalty of 25% for failure to pay such franchise tax when due, and, further, that if the amount of the tax and penalty be not paid in full on or before the first day of July thereafter such corporation shall for such default forfeit the right to do business in said State; such forfeiture to be accomplished without judicial ascertainment by the Secretary of State writing upon the margin of the record kept in his office the words, "The right to do business forfeited and the date of such forfeiture."

The character of business transacted by the Ford Motor Company in the State of Texas is shown by Paragraph 11 of its petition, which is as follows:

> "Plaintiff transacted business in the State of Texas during the whole of its fiscal year 1935, which ended December 31, 1935, and ever since said time and up to and including the date of this petition has continued so to transact its business and intends and expects in the future so to do.
>
> "In brief, plaintiff's Texas business is conducted in the following way: Plaintiff owns and operates within the State of Texas assembly plants. No parts for the self-propelled motor vehicles sold by plaintiff are manufactured at said assembly plant or at any other point within the State of Texas. All of said parts are manufactured at plants outside of the State of Texas, located for the most part in the State of Michigan. The manufactured parts are shipped from Michigan and other points outside of the State of Texas to plaintiff's assembly plants in Texas, and are there assembled, or put together into

finished self-propelled motor vehicles. The assembled vehicles are then sold in intrastate commerce to various dealers, who in turn sell said vehicles to the public. Some of the vehicles assembled at the Texas plants are sold in interstate commerce, but by far the biggest part thereof is sold, as aforesaid, to Texas dealers in intrastate commerce.

"During the year 1935 approximately 60,000 motor vehicles were assembled by plaintiff at its assembly plants in Texas in the manner outlined above. In some few instances completed motor vehicles are shipped into Texas from points outside this State and sold in intrastate commerce. During the year 1935 approximately 700 such units were thus sold in Texas. In addition thereto, Ford Motor Company annually ships into Texas and sells to its various dealers in intrastate commerce many thousands of dollars worth of motor vehicles and tractor parts and accessories, all of which are manufactured without the State of Texas, for the most part, in the State of Michigan." (Tr. pp. 4-5.)

The statistical data of the business of the Ford Motor Company in the State of Texas for the year 1935, as shown by its report to the Secretary of State, and as alleged in its petition, is as follows:

1. Gross receipts of business done in Texas $34,272,887.72.

2. Gross receipts of business done outside of Texas $854,072,087.75.

3. Total gross receipts from all business done both in and outside of Texas $888,344,075.47.

4. Ratio of receipts from business done in Texas to total gross receipts 3.8580606%.

5. Total capital at December 31, 1935, $600,242,-151.57.

6. Value of its invested capital in Texas properties $3,079,417.96.

7. Capital allocated to Texas by the formula as prescribed in the franchise tax statute $23,157,-705.95.

The amount of the total franchise tax due by the Ford Motor Company to the State of Texas for the year 1936, without penalty, amounted to $7,247.40, when computed according to the statutory formula, and as shown by the company's report to the Secretary of State, and as disclosed in plaintiff's petition. (Tr. pp. 8 and 16.)

Petitioner enclosed with its report to the Secretary of State its certified check for $1,224.00, which it asserted was the amount it owed as its franchise tax for the year 1936, and which amount was arrived at by multiplying 3.8589606% of the total of all of its business done during the year 1935 into the amount of its capital which was invested by it in the State of Texas, that is, into $3,079,417.96. (See Paragraph 18 of Plaintiff's Petition, Tr. p. 8.)

The Secretary of State credited the amount of this check on the franchise tax due by the Ford Motor Company for said year, and notified said company that the amount of the tax demanded, without the penalty, was $7,247.40, and petitioner having refused to pay the same within the time required, a penalty of 25% was added to the tax.

It is believed that the gravamen of the petitioner's charge that the franchise tax was illegally laid against it, and that the Texas statute is void, as being in contravention of the Federal Constitution, is set forth in Paragraph 22 of its petition, which is as follows:

> "In the light of the facts and as applied to plaintiff, the formula provided by statute for ascertaining the amount of taxable capital in Texas upon which franchise taxes for foreign corporations are based is arbitrary, unreasonable, whimsical and capricious, and results in the State levying a tax on capital and assets used by plaintiff in its interstate business and in the State of Texas levying a tax upon property outside the confines of the State of Texas, all of which constitutes an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of the provisions of Article I, Section 8, of the provisions of the Constitution of the United States vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several States, and likewise operates to deprive plaintiff of its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the

United States, which provides that no state shall deprive any person of his property without due process of law, nor that the requirement that plaintiff pay a franchise tax to the State of Texas calculated on the formula set up by statute results in plaintiff being required to pay a tax on property neither located nor used within the State of Texas, and a tax upon property used by plaintiff in its interstate and foreign commerce. Much of plaintiff's property located outside of the State of Texas is used in interstate and foreign commerce." (Tr. pp. 12-13.)

It was alleged in Paragraph 23 of said petition that plaintiff's business was largely that of a manufacturer of automobiles, tractors and parts, and that its manufacturing plants are located outside of Texas and in Michigan; that its capital and surplus are represented to a large extent in manufacturing plants, and that much of its personal property consisting of investments in various securities has a taxable situs in Michigan; that the total value of its capital and surplus which were represented by its total assets amounted to $600,242,151.57, of which $504,111,209.10 are located in Michigan. It was further alleged that the effect of applying the statutory formula was "to allocate to Texas capital and surplus of a value largely in excess of the actual value of plaintiff's capital and surplus located in Texas, and results in creating deficiencies in locations in other States, principally in Michigan, of capital and surplus assets represented in those States", in that such formula would have allocated to Michigan of its capital stock only the sum of $190,536,153.33, whereas, its assets so actually located

in that State amounted to the sum of $504,111,209.10; that "What is true of plaintiff is necessarily true of any large manufacturing concern which manufactures in one state but distributes in others, including Texas, in that business is done when sales are made, but the work, labor and processing which necessarily precede the making of sales is done at the place of manufacture"; and, therefore, "that Texas taxes plaintiff's property actually located in Michigan and states other than Texas, on the theory that a certain arbitrary percentage of plaintiff's property representing the value of its capital and surplus is actually located in Texas, whereas this theory has no support in fact."

Petitioner prayed for recovery of the said sum of $7,529.25 so paid to the Secretary of State by plaintiff under protest, that being the amount of the franchise tax and penalty laid against it, less the amount previously paid by petitioner.

There is no allegation in the plaintiff's petition that the $34,272,887.72 gross receipts from plaintiff's business done in Texas for the year in question was in any part derived from other than intrastate business.

RESPONDENT'S COUNTER-PROPOSITIONS TO THE PETITIONER'S SPECIFICATIONS OF ERROR

1.

The District Court properly sustained the general demurrer to plaintiff's petition, for the

reason that no facts were alleged therein which showed that the application of the Texas Franchise Statute to petitioner's business for the year in question constituted a direct burden on interstate commerce, or deprived plaintiff of its property without due process of law, and the Circuit Court of Appeals did not err in so holding.

2.

The Circuit Court of Appeals did not err in holding that the State of Texas may constitutionally measure the value of the annual privilege extended to foreign corporations to transact business in Texas in relation to capital employed and activities conducted by said corporations beyond the confines of the States, when they are considered solely in connection with the use made of such capital and the business conducted by it in the State of Texas.

3.

The Circuit Court of Appeals did not err in holding that the Texas statute apportioned capital on the basis of business done by petitioner in said State.

4.

The Circuit Court of Appeals did not err in holding that the State statute, as applied to the petitioner for the taxable year in question, did

not result in the State of Texas laying a tax on petitioner's property beyond the power of the State to tax, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5.

The Circuit Court of Appeals did not err in holding that the plaintiff's petition failed to allege sufficient facts to show that, as applied to petitioner, the Texas statute operated as an unreasonable and arbitrary burden upon interstate and foreign commerce in violation of Article I, Section 8, of the Constitution of the United States.

STATEMENT

The above five counter-propositions are closely related, and they will be discussed together.

The preliminary statement is adopted as the statement under said propositions.

I.

THE AUTHORITIES CITED BY PETITIONER IN ITS BRIEF DO NOT SUPPORT ITS POSITION

The respondents submit that the authorities cited by the petitioner do not support any of the petitioner's various expositions of error, when such authori-

ties are analyzed in connection with the provisions of the Texas statute. In this connection it is deemed proper to here repeat the language of this Court in the case of *Colgate* v. *Harvey*, 296 U. S. 404, 80 L. Ed. 299, which was concerned with the income tax law of the State of Vermont. The Court said:

> "The boundary between what is permissible and what is forbidden by the constitutional requirement has never been precisely fixed and is incapable of exact delimitation. In the great variety of cases which have arisen, decisions may seem difficult of reconcilement; but investigation will generally cause apparent conflicts to disappear when due weight is given to material circumstances which distinguish the cases. If the evident intent and general operation of the tax legislation is to adjust the burden *with a fair and reasonable degree of equality*, the constitutional requirement is satisfied." (Italics ours.)

It is apparent that the petitioner places great reliance upon the case of *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 54 L. Ed. 255. The Court in that case held that if the statute there under attack and as reasonably interpreted did directly, or by its necessary operation burden interstate commerce, it must be held to be invalid; and that the Court would not regard the mere form, but would look through that to the substance of things in order to determine the nature and application of the tax to the facts. Those expressions of the Court, however, may only be properly applied when considered in connection with this fur-

ther statement of the Court, viz., "That an interstate carrier, entering a state for purposes of its business, is subject to local regulations that in their intent and purpose only incidentally affect interstate commerce, but are established in good faith."

The Kansas statute differed substantially from the present Texas statute in that the Kansas statute provided in substance that each corporation, before filing its charter with the Secretary of State, should pay to the State Treasurer of that State, for the benefit of the permanent school fund, a charter fee based upon a stated percentage of "its authorized capital, wherever employed." The difference in the text and meaning of the Kansas statute as compared with the Texas statute is at once apparent, for the Kansas tax, as stated in substance by the Court, was laid upon the *authorized* capital of the company regardless of what may have been the percentage of its properties and business in Kansas as compared to its total capital and business both in and out of that State. The tax was, therefore, considered by the Court to be purely arbitrary and a direct burden upon the company's interstate business, and that the tax plainly was not based upon such of the company's capital stock as was represented in its local business and property in Kansas.

The Court in that case distinguished its decision from the case of *Western Union Telegraph Company* v. *Attorney General of Massachusetts*, 125 U. S. 530, 31 L. Ed. 790, and in so doing said, "A tax nominally upon the shares of the company was held in

effect a tax only on property owned and used by the company *in Massachusetts*, because and *only because*, the basis established for the ascertainment of the value of such property was *the proportion of the company's lines in the State to their entire length throughout the whole country*. Such a tax was held not to be forbidden by the Constitution because *based* on the company's stock representing only its business and its property inside the State." (Italics the court's.)

We submit, therefore, that there is no reasonable ground to conclude from anything the Court said in the Kansas case that the decision there reached may be construed as a precedent for condemning the Texas statute; but to the contrary, it may be assumed that had the Kansas statute been as carefully drafted as the Texas statute, the Court would have reached a different conclusion.

In the case of *James* v. *Dravo Construction Company*, 302 U. S. 134, 82 L. Ed. 155, the question for decision was stated by Mr. Chief Justice Hughes, as follows:

> "This case presents the question of the constitutional validity of a tax imposed by the State of West Virginia upon the gross receipts of respondent under contract with the United States."

The Court held that the State of West Virginia could lawfully levy a gross receipts tax upon the receipts from the business of the corporation transact-

ed in that State, but that such tax could not lawfully be laid upon its gross receipts with respect to the "work done" and business conducted by it in the State of Pennsylvania, and that "an apportionment was necessary to limit the tax accordingly."

A gross receipts tax, being an excise tax, necessarily bears some relation to a franchise tax which a state may lawfully lay upon a foreign corporation for its privilege of doing an intrastate business in the state; but it is a fallacious concept to confuse one tax with the other. They may be similar but they are not identical, and that was factually demonstrated by the statement of the West Virginia case, for the gross receipts tax laid by that State upon the Pennsylvania corporation was expressly said to be in addition to the franchise tax of that State. The distinction which ordinarily exists between the two kinds of taxes has frequently been recognized by the courts; and it is not thought necessary to pursue this particular discussion further than to say that it is believed that if the State of West Virginia in formulating its statute had provided that such such tax be laid upon that amount or portion of the gross receipts of the corporation as the receipts from its business in West Virginia bore to the gross receipts from its business from all sources, the statute would have been upheld by the Court in its entirety.

The case of *Hans Rees' Sons* v. *North Carolina ex rel Maxwell*, 283 U. S. 123, 75 L. Ed. 878, is distinguishable from the instant case in that there the subject involved was an income tax assessed by the tax-

ing authority of North Carolina against the appellant in that State. The cause arose by appellants making application to the State Commissioner of Revenue for a readjustment of the taxes that had been assessed against it for the several years in question. The statute of North Carolina provided in substance with respect to a foreign corporation that its net income taxable in that State should be measured by that proportion of its entire net income as the cash value of its real estate and tangible personal property in that State bore to the cash value of all its real estate and personal property.

The appellant was a New York corporation engaged in the business of tanning, manufacturing and selling leather goods. Its manufacturing plant was situated in North Carolina, but the sales of its manufactured products were made throughout the United States and Canada. The testimony offered by the appellant before the Commissioner showed that only about 20% of its entire income was earned from its business transactions in the State of North Carolina, whereas, by the application of the statutory formula, a tax of from 66% to 85% of the total income of the corporation from all sources was taxed by that State. Upon that state of facts the Supreme Court of the United States held that "The statutory method as applied to the appellants' business for the years in question operated unreasonably and arbitrarily in attributing to North Carolina a percentage of income out of all proportion to the business transacted by the appellants in that State."

It is thought that a state statute which provides for the assessment of an income tax upon a corporation doing both an intrastate and interstate business must be reasonably flexible in its operation, and that any statutory formula for laying the tax may not be used to assess a tax upon income which does not in fact exist in the taxing state. The ultimate fact to be determined in such a case is that amount of the taxpayer's income which flows from his business in the particular state, and upon that issue the taxpayer undoubtedly had the right to go into court and be heard. When, therefore, the amount of the intrastate income of the corporation has been judicially determined, the statutory ratio for assessing the tax may be applied.

A franchise tax or privilege tax proceeds from a somewhat different theory from that of an income tax, and while both capital and income of corporations may be, and usually are, taken into consideration by the State Legislature in enacting a statute, nevertheless the essential element considered and the subject of the tax, is the value of the privilege which the corporation enjoys at the hands of the State to do an intrastate business in that State.

It is believed that the case of *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203, 69 L. Ed. 916, which is also cited by petitioner in support of its position, has no application whatever to the case at bar. In that case the facts were undisputed, and it was expressly admitted by the Attorney General that the cement company's business in the

State of Massachusetts was "exclusively" an interstate business. The Supreme Court in the course of its opinion took occasion to discuss some of the state formulas for laying an excise tax upon foreign corporations, and said: "Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of *interstate transactions*." (Italics ours.)

In the case of *Cudahy Packing Company v. Hinkle*, 278 U. S. 460, the Supreme Court condemned the franchise tax of the State of Washington. The statute of that State provided "that every corporation . ... required by law to file Articles of Incorporation in the office of Secretary of State, shall pay to the Secretary of State a filing fee in proportion to its authorized capital stock"; and which fee was graduated according to the amount of the capital. It was shown that the *issued stock* of the packing company was much less than its authorized capital stock.

The Court in its opinion followed *Looney* v. *Crane Company*, 245 U. S. 178, 62 L. Ed. 230, and held the taxing statute void as to the packing company, because it undertook to lay the tax according to a given percentage of the *entire authorized capital stock* of a foreign corporation doing both a local and interstate business, and that it thereby directly burdened interstate commerce and "exerted the taxing authority of the State over property and rights which were wholly beyond" the jurisdiction

of the State. It will be noted that the Washington statute is materially different in its language and conception from the present Texas statute; and it is also to be noted that the Court is now concerned with a very different Texas statute from that condemned by the Court in the Looney case.

In the case of *Hines* v. *Wallace*, 253 U. S. 66, 64 L. Ed. 782, the action was concerned with one certain section only of a special excise tax of the State of North Dakota, which section was applicable alone to railroads, telegraph companies, and other similar corporations. The section of that law there in question was contained in the following proviso:

> "Provided, that in the case of a railroad . . . having lines that enter into, extend out of, or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State . . . "

It is common knowledge that the capital of a railroad company is only partially represented by the length of its trackage for, as stated by the Court in that case, the cost of construction of the railroad and its valuable terminals must necessarily be taken into consideration in any case in determining the value of the capital of the railroad. Furthermore, it was emphasized by the Court in its opinion that North Dakota is a State of plains, very different from other states and that the cost of its road there

was much less than it was in the mountainous regions of other states across which the road had to traverse; that North Dakota is mainly agricultural, and that its markets are outside its boundaries, and that most of its distributing centers are also outside the State. The Court said, "So, looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

The Circuit Court of Appeals in deciding the case at bar drew a clear and substantial distinction between it and the Hines case wherein it said that the Supreme Court had held void only the exceptional phase of the Dakota statute "which put upon railroads a peculiar method of mileage apportionment of capital between the states in which they did business, which was thought arbitrary. Had the apportionment for railroads been like to that for other corporations, on the basis of business done, as here, we apprehend the result would have been otherwise."

In the case of *Fargo* v. *Hart*, 193 U. S. 490, 48 L. Ed. 761, the Supreme Court had before it for review a statute of the State of Indiana which undertook to levy a direct tax upon the property of corporations doing both intrastate and interstate business. The court defined the tax as follows: "The tax is a tax on property, *not on the privilege of doing business*, but it is intended to reach the intangible value added to what we have called the

organic relation of the property in the State to the whole system." (Italics ours.)

It was shown on the hearing before the State Board of Tax Commissioners of that State that only a small proportion of the tangible property of the Fargo Express Company was situated in the State of Indiana, but that it had at the taxing date approximately $17,000,000.00 of property situated in other states which was not used in its business, and about four and one-half million dollars of property which was used in its business of which there was less than $800,000.00 worth situated in Indiana. Several other factual elements appear to have been taken into consideration by the Court which provoked the Court to hold that the taxing board of Indiana did take into account property which it had no right to consider "in fixing the assessment at the large sum which we have mentioned."

Whatever difference of opinion may exist in the legal mind with respect to the argument and conclusion reached by the Court in that case—and this is said in view of the fact that Mr. Chief Justice Fuller, Mr. Justice Drew and Mr. Justice Day dissented—it is submitted that both the standard fixed by the Indiana statute for laying the tax and the kind of tax there under consideration clearly distinguish that case from the present case.

There are a few cases cited by the petitioner in its brief to this Court which we do not review for the reason that it is believed that they either have

no possible bearing upon the merits of this case, or that they were cited merely to be distinguished as being of no authority in support of the respondent's position.

II.

The Texas statute in question is a non-discriminatory franchise tax, which is both constitutional and reasonable in its terms. It does not, as applied to petitioner, levy a tax on property outside the State or burden interstate commerce within the meaning of the Constitution, and the tax levied against petitioner is not arbitrary but is a reasonable tax for the privilege of petitioner exercising its business in this State for one year.

In the case of *Southern Realty Corporation, et al.*, v. *McCallum, Secretary of State*, reported in 65 Fed. (2d) 734, the statute under consideration was attacked by a number of corporations which sought to restrain the Secretary of State from enforcing the statute in question on the ground that it conflicted with the commerce clause of the Federal Constitution "and due process and equal protection clauses of the Fourteenth Amendment." Several special allegations were made in the bill in that case which petitioners said led to those conclusions.

Both the District Court and the Circuit Court of Appeals held that the statute was immune from all such attacks, and that the law was in all respects

valid and enforceable according to its provisions, with the possible exception of one administrative feature, which was adverted to by the Circuit Court of Appeals and which was held to be severable, and, therefore, immaterial. Certiorari was denied. 290 U. S. 692, 78 L. Ed. 695.

While the Supreme Court of Texas has written no opinion on this statute, nevertheless it has been approved by that Court, as against the attack made on it and the tax levied thereunder, in the case of *United North & South Development Co.* v. *Heath, Secretary of State.* In that case the petitioner, a Delaware Corporation doing business in Texas under a lawful permit, made its report in accordance with the statute to the Secretary of State, and in which it was claimed that the franchise tax for the year involved amounted to $941.41, and which amount the corporation tendered with its report. The tendered amount was refused as in satisfaction of the tax, for the reason that under the statute the tax amounted to $8,117.40. Payment of the tax was refused, and the Secretary of State added 25% penalty to the tax. The corporation thereupon sought a permanent injunction against the Secretary of State to restrain the collection of the tax. The injunction was refused by the District Court, from which an appeal was taken to one of the Courts of Civil Appeals of Texas which resulted in that Court affirming the judgment of the District Court as shown in the opinion reported in 78 S. W. (2d) 650. The appellant applied for a Writ of Error to the Supreme Court of Texas, which writ was denied.

We quote briefly from the opinion of the Court of Civil Appeals:

"* * * This amendment—(speaking of the present statute)—but evinces a legislative intent to reckon the amount of the tax to be charged in proportion to the value of the privilege granted. As was stated by the Supreme Court of Missouri in State ex rel. Marquette Hotel Inv. v. State Tax Com., supra: 'Franchise taxes, to be fair, should be measured by the volume of business. The volume can best be measured by the property used in the business.'

"Since such tax is payable in advance, the state may, in computing such tax, look to the property owned by the corporation and available to it, for use during the ensuing year in carrying on its business. Such was clearly, we think, the legislative intent. * * *

"It follows, therefore, that the tax demanded of appellant was not one arbitrarily fixed by the Secretary of State, nor contrary to the holding of the court in Southern Realty Corporation v. McCallum, supra. Nor was it undertaken to be assessed by the Secretary of State. *'It was fixed by statute, and the only thing the Secretary of State did was to compute the amount of such tax from the information furnished him by appellant itself in its sworn report filed in his office.*" (Italics ours.)

The refusal of the writ of error by the Supreme Court in that case, by virtue of Article 1728, Revised Civil Statutes of Texas, 1925, as amended by the Fortieth Legislature, constituted an approval by

the Supreme Court of the decision of the Court of Civil Appeals. This statute in part provides: "In all cases where the judgment of the Court of Civil Appeals is a correct one, and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court shall refuse the application." The statute was so construed by the Supreme Court in *Hamilton* v. *Empire Gas & Fuel Company*, 110 S. W. (2d) 561, at page 565.

It is, therefore, submitted that the validity, that is to say, the constitutionality, of the Texas franchise statute is not now, if it ever was, a debatable question, for that matter has been determined in favor of the State by the decisions of both the State and Federal courts, at least as to its applicability to corporations, in general.

We think, also, that every substantial allegation made by petitioner against the statute and the tax levied thereunder, as related to the claimed peculiar situation of the Ford Motor Comapny, has been determined against it by those courts, especially so by the decision in the Southern Realty Company case. Petitioner thinks and contends otherwise, althouh it concedes, to quote from its Brief, that, "Plainly, Texas has adopted a formula which, when applied to many unitary corporations conducting activities in several states, will fairly apportion capital between states." Petitioner precisely states its position in the following language, also taken from its Brief, viz: "The question here is not the right of Texas to apportion capital on some fair basis. It

is, rather, does the statute as applied to one situated as petitioner, actually carry out the legislative scheme of taxation within permissible limits."

Therefore, stated in another way, and from respondents' point of view, the question now before the Court appears to be, has the petitioner succeeded in removing the burden which it has logically and necessarily assumed; that is to say, has the petitioner made a paper case for itself by any substantial fact allegation contained in its petition, whereby the court must conclude that petitioner should be exempt from the operation of the Texas franchise tax law—which admittedly bears fairly upon unitary corporations, in general—and that as to the petitioner the law must be held void as being in violation of the Federal Constitution.

Respondents respectfully submit that the plaintiff's petition fails to state a case in respect both as to those facts which if alleged, as well as to what it failed to allege.

The appellant's real contention, as stated by the Circuit Court of Appeals is, "that because it both manufactures and sells automobiles, the principal manufacturing activity and the capital necessary for it being in Michigan, gross income from sales is an arbitrary basis of apportionment in its case; and because the proportion of its capital investments located in Texas is far less than the proportion of its income there received, there is in effect a taxing of investments outside that State; and since the capital and investments outside the State are used

largely in interstate business there is a burden on interstate commerce."

The Circuit Court's analysis of this contention and its consequent denial of same are thought by the respondents to be convincing and irrebuttable. Also it is submitted that a similar charge against the New York franchise statute and the tax assessed thereunder was set aside by the Supreme Court in the following case, that is to say:

In the case of *People ex rel. Bass* v. *Tax Commissioner*, 266 U. S. 271, 69 L. Ed. 282, it appeared that the Bass Corporation was engaged in selling ale, that all of its brewing was done, and the larger part of its sales were made, in England, but that it formerly imported a portion of its product into the United States, which it sold through branch offices located in New York City and in Chicago. The statute provided that for the privilege of doing business in that State, a foreign corporation circumstanced as the complainant was should pay in advance an annual franchise tax to be computed at a certain percentum upon that portion of its ascertained net income as was determined by the proportion which the aggregate value of specified classes of assets of the corporation within the State bore to the aggregate of all such classes of assets wherever located.

It was contended by the Bass Corporation that the tax was based, not upon any net income derived from its business in New York, but upon a

portion of such income derived from business carried on outside the United States, which, under the provisions of the statute had been arbitrarily allocated to the New York business, and that the imposition of such tax deprived it of its property in violation of the due process clause of the Fourteenth Amendment, and imposed a direct burden upon its foreign commerce in violation of the commerce clause of the Constitution.

The Court, after holding that the tax was "primarily a tax levied for the privilege of doing business within the State," and that it was not a direct tax upon the allocated income of the corporation in any given year, held that the question of constitutionality of the tax was similar in its essential aspects to that held constitutional in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L. Ed. 165. And with respect to the fact contention of the complainant, the Court said that inasmuch "as the company carried on a unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions, *beginning with the manufacture in England and ending in sales in New York and other places*—the process of manufacturing resulting in no profits until it ends in sales—the state was justified in attributing to New York a just proportion of the profits earned by the company from such unitary business." (Italics ours.)

It is alleged by the petitioner that the Texas statutory method of assessing the franchise tax

is as to it arbitrary, unreasonable, whimsical and capricious, all of which is connected with its further charge that the allocating and apportioning to Texas slightly in excess of $23,000,000,00 of the capital set-up of the Ford Motor Company, when the actual net book value of its invested assets in Texas was approximately only $3,000,000.00, is legally insupportable, and that as far as the State could legally go in assessing the tax would be to base the ratio determined by the statutory method upon the single amount of its invested capital in Texas. While according to the statutory formula there was attributed to Texas for the purpose of laying the tax the approximate sum of $23,000,000.00 of such capital, it is shown by the petition that the business done in Texas by the corporation in the preceding year exceeded $34,000,000.00, which was 3.85% plus of the total business done by plaintiff, that total business amounting to more than $888,000,000.00. It is also shown by said petition that the total franchise tax assessed against the Ford Motor Company when computed according to the statutory formula for the year in question was approximately $7,200.00. So it is seen that the tax as precisely determined represents only two ten-thousands of one per cent (.0002%) of the total gross receipts of the corporation for such year.

If is believed that the comparatively insignificant amount of this tax demonstrates that the petitioner's charge that the tax is arbitrary, whimsical, unreasonable and capricious, is fallacious, and that, there-

fore, the complete answer to petitioner's contention is found in plaintiff's petition.

On a similar charge to that of petitioner, but based upon sounder reasons than those alleged by the petitioner, this Court in the Bass case, supra, held that the tax there assessed according to the ratio of the segregated assets of the corporation located in New York and elsewhere, was not inherently arbitrary, and that it was not a "mere effort to reach profits earned elsewhere, under the guise of legitimate taxation." It was further held by the Court in that case as a matter of fact, that the complainant there failed to deduce any evidence that would justify the Court in holding that the tax levied was, as applied to the petitioner, unreasonable, the Court saying: "It is not shown in the present case any more than in the Underwood case, that this application of the statutory method of apportionment has produced an unreasonable result. The fact that the company may not have had any net income upon which it was subject to payment of income tax to the Federal government—(which fact was shown) —obviously does not show that it received no net income from the business which it carried on in New York."

There is no pretense of a showing upon the part of the petitioner in this case, as deduced from anything said in its petition, that the intrastate business of the Ford Motor Company, which amounted to more than $34,000,000.00 in the previous year, when considered in connection with the approximately

$23,000,000.00 of the capital allocated to Texas, did not upon that basis produce any profit for the company. The natural inference is to the contrary. So, we think that the remarks of the Circuit Court of Appeals in this case were definitely applicable when it said, in substance, that the object of the corporation being to make money, and that no money can be made until it sells its manufactured products, that if it chooses to sell in Texas, "and extracts cash from Texas, with the great advantage that manufacturing its own wares gives in competition with those who do not manufacture, it is not unreasonable to regard the potency of the capital used in the manufacture as following proportionately the goods offered for sale in Texas." And, further, it must be remembered that in this case a part of the manufacturing of petitioner's products occurred in Texas.

The Court further said, in substance, that if it were practicable to separate the manufacturing from the selling activities of the corporation, elsewhere, and the manufacturing activities in Texas from those elsewhere, plaintiff's petition afforded "no data to do it." See 100 Fed. (2d) 517.

Respondents cite the case of *Norfolk, etc. R. R. Company* v. *North Carolina*, 297 U. S. 682, L. Ed. 977, as authority in favor of their position in general, but especially with respect to plaintiff's contention that the Texas statute is void as to it, because of the circumstances as relates to the value of its manufacturing plant and assets in Michigan.

No fact is alleged by petitioner with respect to that situation than that the major portion of its capital structure is situated in that State, and from that the petitioner deduces as a legal conclusion that the portion of capital allocated to Texas business for the computation of the tax is excessive and, therefore, is sufficient of itself to condemn the statute.

The question about which the Court was concerned in the cited case was an income tax enacted by the North Carolina statute, as related to interstate railway companies, and which was laid according to the method or formula as defined in the statute. Gross revenue and operating expenses within and without the State, as well as the mileage of such corporation, were all taken into consideration. It is not necessary to give an accurate definition of that statute. The Norfolk Railroad Company contended the tax as laid against it was void for the reason that the operating expenses for its North Carolina branches were far in excess of those allowed by the State Commissioner, who had refused to depart from the statutory formula in a hearing before him upon this tax. The Supreme Court in its opinion said there was evidence to support the position of the Railroad Company, but that if it be accepted as fact, the result would not invalidate the tax, because such higher cost could well be attributed to the mountainous terrain and the low density of traffic, as well as to other causes; *that the railway company took upon itself the burden of making out a case for the rejection of the statutory formula,*

and having gone no further than to prove the single fact stated, that fact was not sufficient to overturn the tax.

The Court further held that it was unable to accept the argument of the Railroad Company that its burden was discharged when it gave evidence of the ratio between actual and average expenses *while keeping silent as to the ratio between actual and average receipts*, and as to which the Court said: "The statutory formula is not framed on an assumption that gross operating revenues are uniform actually for every mile throughout the system. It is not framed on an assumption that for every mile of the system there is uniformity of expense. Such assumptions, if made, would be contrary to notorious facts. * * * *The implications of the formula being what they are, a taxpayer does not escape the application of the statute by evidence directed to only one of its related terms.* Its evidence, to be effective, must be directed to each of them alike, for only thus can the assumed relation between them be proved to be unreal. This taxpayer disclaims the duty and even the endeavor to respond to such a test. *It varies the numerator of the fraction while accepting the denominator.*" (Italics ours.)

The Court took occasion to say, in passing upon the case, that it did not assume that the State income tax might not have been apportioned by a method more accurate, but that of itself was an insufficient reason for declaring the statute void.

In the case of *Educational Film Corporation* v. *Ward*, 282 U. S. 279, 75 L. Ed. 400, the Court had before it the question of the validity of the franchise tax of the State of New York, and which it upheld against very similar charges to those contained in plaintiff's petition here. In passing upon the case, the Court said that it was plain that a franchise tax can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise in the State, and that under the Constitution "the privilege of exercising a corporate franchise is the legitimate object * * * of the State's power to tax." And in discussing that power of the State in connection with the immunities of which a taxpayer may avail himself under the Federal Constitution to escape a state tax, the Court said: "This Court in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a *mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government.* The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and state governments exercise their authority over one people within the territorial limits of the same state. *The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution without undue interference by the other.*" (Italics ours.)

Similar in effect to the above cited case is that of

People v. *Latrobe*, 279 U. S. 429, 73 L. Ed. 766, 65 A. L. R. 1341, in which the Court upheld a privilege tax enacted by the State of New York, which, in substance, is very similar to the Texas statute. The New York statute imposed on every foreign corporation doing business in that State "a tax computed upon the basis of capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed by that proportion of its total *issued capital stock* which its gross assets employed within the State bears to its gross assets wherever employed."

The trial court, on the theory that the tax, as applied to the corporation, was not an admission tax imposed as a condition to its entrance into the State, held that the corporation could invoke the equal protection clauses of the Federal Constitution, and that the tax was void because it was in violation of the equal protection clause of the Constitution. The trial court based its decision upon the case of *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71.

The Supreme Court said that it was not necessary to determine whether the tax there in question might be sustained because it was imposed as an entrance fee, for assuming that the corporation was already within the State, and thus entitled to equal protection, the tax was not "so unreasonable or discriminatory as to deprive the corporation of any constitutional immunity." The Court distinguished that case from the Air-Way case, and in doing so said that

it was carefully pointed out by the Court in the Air-Way case that the tax there under consideration "was computed upon the authorized shares of such a corporation, whether or not subscribed for or issued, and so had no relation to the value of the privilege exercised by the foreign corporation within the State, and was not a reasonable measure of the tax imposed upon such a privilege." The Court cited the case of *Roberts & S. Co.* v. *Emmerson*, 271 U. S. 50, 70 L. Ed 827, which also distinguished the decision in the Air-Way case, and in that case it was said: "The authority to issue its capital stock was the privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock"; and that this, as decided in the Air-Way case, resulted in a tax larger than taxes imposed on other corporations for like business and property within the State. The natural consequence of which made the tax discriminatory and in violation of the equal protection clause of the Constitution. The Court further said in the Latrobe case: "There is no complaint of discrimination between foreign and domestic corporations, and no attempt to tax property outside the state, since the tax is apportioned to the property used within it. * * * A state which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock (*Rob-*

erts & S. Co. v. *Emmerson*, supra), has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there, and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the state and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.

"There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. * * * Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business." (Citing many cases).

Respondents think that the decision of the Court in the Latrobe case negatives every proposition urged by petitioner against the Texas statute. Before concluding, however, we notice again briefly petitioner's charge that the tax levied in the instant case imposes a direct burden upon petitioner's business in interstate commerce.

We submit that petitioner alleges no facts showing a burden on interstate commerce. It will be repeated that this is a franchise tax laid solely upon the privilege of doing intrastate business. The total of all business, intrastate, interstate and foreign,

must necessarily be considered as being incidentally concerned with the amount of petitioner's Texas intrastate business in order to determine the percentage allocated to Texas. Thus, interstate business is considered in a manner which will reduce such percentage, rather than increase it. And the Secretary of State took petitioner's own figures as to the Texas intrastate business, $34,272,887.72, as well as the whole of petitioner's business, $888,334,775.47. It has been so often decided by the courts as to become elementary that the fact that the Ford Motor Company may do some foreign and interstate commerce business does not mean that it shall not be subject to any State franchise tax which considers as one element the total amount of the business done by the corporation as related to the total amount of its intrastate business, for, to say the least, in such case interstate commerce is burdened, if at all, in an incidental or indirect way by the tax.

In the case of *International Shoe Co.* v. *Shartell*, 279 U. S. 429, 73 L. Ed. 785, this Court had before it for consideration the Missouri Franchise Statute. Without quoting that statute, it is submitted that it is believed to be substantially similar in its provisions to the Texas statute. In that case the charge was made by the plaintiff corporation that the tax unduly burdened interstate commerce, and was, therefore, void. We quote from the Court's opinion as follows: "The mere fact that the corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business. . . .

Appellant does a substantial amount of local commerce. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce." (Citing many authorities.) * * * "The tax is distinguishable from those considered in *Air-Way Electric Appliance Corp.* v. *Day*, supra, and *Looney* v. *Crane*, 245 U. S. 178, 62 L. Ed. 230, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, *which either were measured by authorized instead of issued capital stock, or were not limited to the part of the capital stock justly apportioned to the taxing state.*"

Additional authorities:

Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 410, 81 L. Ed. 1193
Atlantic Refining Co. v. Virginia, 302 U. S. 22
Crude Oil Co. v. Yount-Lee Oil Co., 122 Tex. 21, 52 S. W. (2d) 56
Delaware Railfoad Tax Case, 85 U. S. , 18 Wall. 206
Home Insurance Co. v. New York, 134 U. S. 594, 34 L. Ed. 1025
Roberts & Co. v. Emmerson, 271 U. S. 50, 70 L. Ed. 827, 49 A. L. R. 1495
Southwestern Oil Co. v. Texas, 217 U. S. 114

The State of Texas levies no income tax on corporations or others.

The franchise tax, as enacted into the laws of the State of Texas, bears inherent evidence that it was carefully and intelligently conceived, so as to bear equally as nearly as possible upon all corporations according to the value of their business potency while exercising the privilege of carrying on their business within the State.

In enacting the law it is believed that the State of Texas acted within constitutional limits and under its measured sovereign capacity, for the purpose of raising revenue for the support of the State government. Under this State government the petitioner has police protection within its whole territorial limits. The petitioner desires to exploit its business and to make money while doing an intrastate business within the State, but petitioner has assumed to define its own terms and the amount of tax which it chooses to pay for that privilege. This position of the petitioner is insupportable and disregards the duty of the State to legislate in such way as to preserve equality with respect to all corporations, both foreign and domestic, doing business within the State.

It is submitted that the statute is not subject to the constitutional objections urged against it and that the tax levied thereunder against the petitioner is neither discriminatory nor unreasonable.

WHEREFORE, respondents pray that the judgment of the Circuit Court of Appeals, and that of the Dis-

trict Court be in all things affirmed, and for general relief.

Respectfully submitted,

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First Assistant Attorney General

Attorneys for Respondents.

The attorneys for Petitioner, Ford Motor Company, are: Gaius G. Gannon and Baker, Botts, Andrews & Wharton of Houston, Texas.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 17

FORD MOTOR COMPANY,

Petitioner,

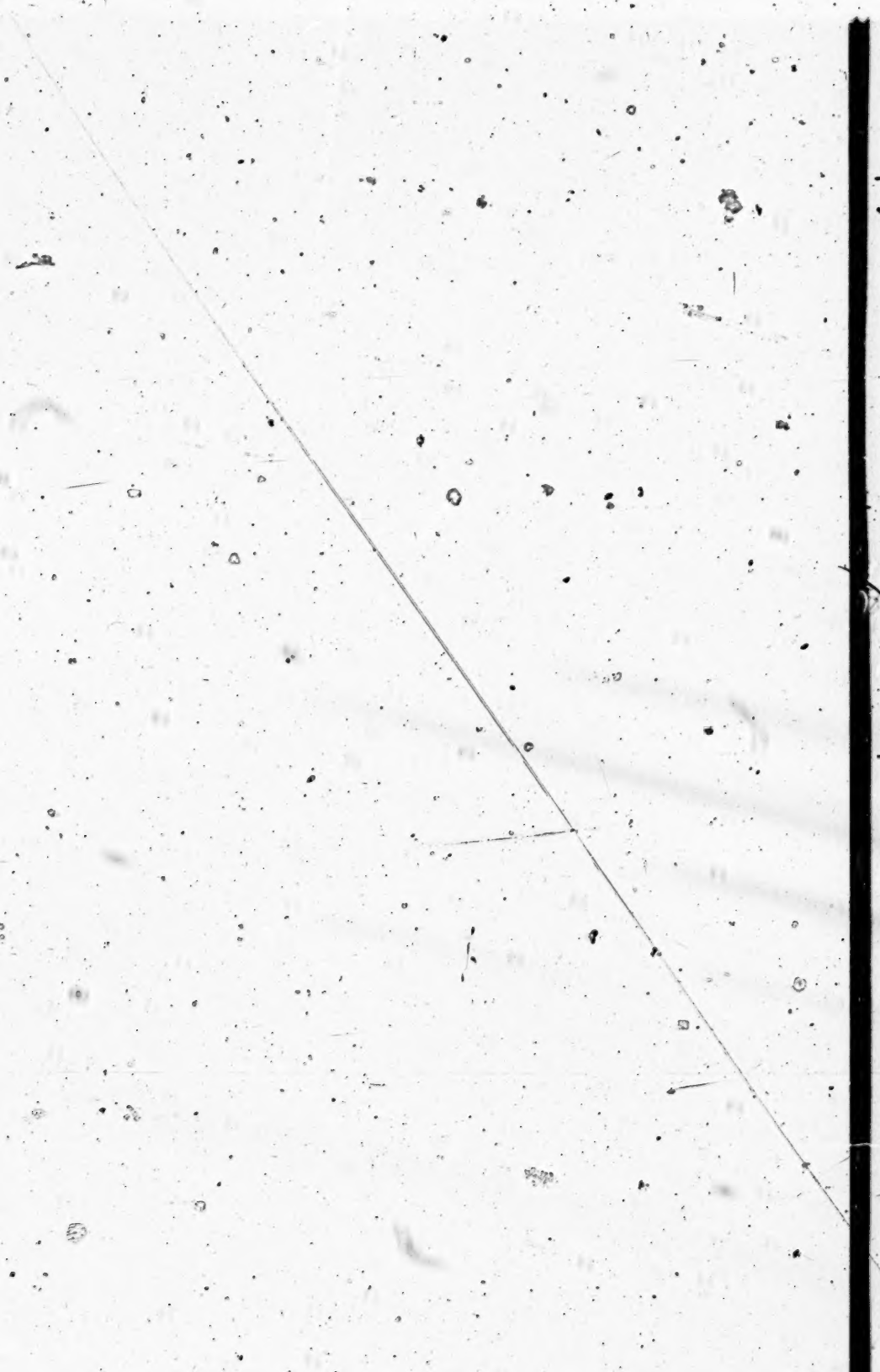
vs.

M L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OTION FOR REHEARING OF PETITIONER FORD MOTQR COMPANY

GAIUS G. GANNON,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 17

FORD MOTOR COMPANY,

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TOM L. BEAUCHAMP, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR REHEARING OF PETITIONER FORD MOTOR COMPANY

May It Please The Court:

Petitioner Ford Motor Company, feeling aggrieved at the judgment and opinion of this Honorable Court rendered and delivered December 11, 1939, respectfully files this, its Motion for a Rehearing, and prays that on such rehearing the judgment of affirmance heretofore rendered be set aside,

and that the judgments of the District Court and of the Circuit Court of Appeals be reversed, and that petitioner be granted such relief as may be appropriate in the premises.

Foreword

Both the opinion and the results reached in this case establish landmarks in constitutional law.

The Court says: "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." Heretofore, it has been thought that though domestic corporations, by the acceptance of their charters from the state of their creation, subject themselves to such burdens as the right of the state to tax their property wherever situated, *Kansas City, etc. R.R. Co.* v. *Stiles*, 242 U. S. 111, foreign corporations were free of such burdens, and subject to taxation only on account of their property and activities *within* the state. Cf. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane*, 245 U. S. 178; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123.

The Court says: "In the unitary enterprise property outside the State, when correlated in use with property within the State, necessarily affects the worth of the privilege within the State." This is contrary to much that has gone before. Cf. *Fargo* v. *Hart*, 193 U. S. 491, where it is said: "The notion of organic unity may be made a means of unlawfully taxing a privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning," and that to measure a tax on a local privilege in relation to the value of property neither in the State nor devoted to the business for which the tax is exacted constitutes "taxing property outside of the State under a pretense". *Wallace* v. *Hines*, 253

U. S. 66, is to the same effect. In that case it is said: "The only reason for allowing the State to look beyond its borders when it taxes the property of foreign corporations is that it may get the *true* value of the things within it, when they are part of an organic system of wide extent, which gives them a value above what they otherwise would possess." These principles were followed by the Court as late as *Hans Rees' Sons* v. *North Carolina, supra*, the Court saying: "But the fact that the corporate enterprise is a unitary one in the sense that the ultimate gain is derived from the entire business does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State, *regardless of the extent to which it may be derived from the conduct of the enterprise in another State.*"

The Court for the first time in a tax case alludes to "financial power inherent in the possession of assets (which) may be applied with flexibility, at whatever point within or without the State the managers of the business may determine". It has heretofore been ruled that such considerations may be taken into account only in connection with entrance fees which have been held to be "not a tax but compensation for a privilege applied for and granted". These entrance fees have been strictly distinguished from franchise taxes proper, it being said that the latter, while sometimes called filing fees, are "in each case strictly a tax". It was on this theory alone that the Court supported the right of the State in *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22, to look to property beyond its borders in assessing an entrance fee. In that case such cases as *Western Union Telegraph Co.* v. *Kansas, supra, Looney* v. *Crane, supra*, and others of similar import, were held inapplicable on the grounds that they involved, as does the present case, franchise taxes

proper which are "strictly a tax" and not "compensation for a privilege applied for and granted".

The Court rules the present case on the principles of *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 424-425. But the cases are radically different and obviously distinguishable. In the *Louisiana* case *the proof showed* and the Court found *as a fact* that extra-state property and activities, of the company involved, added in a clear and unmistakable way to the value of the intrastate privilege, and not only that, but presumptively to such an extent as to make the taxes fair and reasonable in relation to the intrastate privilege enjoyed. In short, under a legislative scheme *totally different* from that presented by the Texas Franchise Tax Law, it was held that the legislature had *fairly* measured the value of an intrastate privilege in relation to extra-state property and activities which added to the value of the intrastate privilege in a clear and unmistakable way.

The Court distinguishes *James* v. *Dravo Contracting Co.*, 301 U. S. 425, saying that the privilege tax there considered "* * * in so far as it was upon receipts * * * for work done in other States" was conceded to be outside the taxing power of the statute. But, the Court at one point appears to reject petitioner's contention that *local assets* rather than *local gross receipts* are used in the taxing formula. If the Texas statute falls upon gross receipts rather than upon assets employed in obtaining them, then *James* v. *Dravo Contracting Company, supra*, has unmistakable application because it is alleged and the demurrer admits that petitioner's Texas gross receipts are attributable in large measure to manufacturing property held and manufacturing activities conducted without the State.

It is respectfully urged that petitioner's contentions, which are based upon admitted allegations, deserve the Court's careful re-examination.

Specification of Error.

The Court erred in holding that as applied to a corporation situated as is petitioner, a State franchise tax based upon capital employed in Texas, calculated by the percentage of sales which are within the State, does not violate the due process clause of the Fourteenth Amendment as a tax upon property beyond the jurisdiction of the State, and as a tax upon extra-state property used in petitioner's interstate activities.

Remarks

The opinion does much to clarify the issue. There is a distinct holding that the basis of the tax is "capital employed in Texas". This is in accord with the Texas decisions. *Investment Securities Co. of Texas* v. *Meharg*, 115 Tex. 441; *Staples* v. *Kirby Petroleum Co.*, 250 S. W. 293.

The statutory formula results in allocating to Texas as assets "employed in Texas" $23,000,000 of petitioner's capital. It is clearly and unmistakably alleged, and the demurrer admits, that of petitioner's total capital, only somewhat over $3,000,000 is actually located, held or used in Texas, and that the excess property allocated to Texas is neither located nor used within the State. See the Petition (R. 10, R. 12) where the tax is alleged to be upon property "neither located nor used within the state of Texas" and upon "business transacted outside of the State of Texas," and "a tax on property neither located nor used within the State of Texas" and "a tax upon property used by plaintiff in its interstate and foreign commerce".

The issue is narrow, and the only question is whether the statutory allocation is arbitrary and capricious. Precedents afford ample standard by which to measure the validity of the results of the statute. It is true the State, in taxing a local privilege, may look to property beyond its borders,

but it is also true that the only reason for this "* * * is that it may get the true value of things within it when they are part of an organic system of wide extent that gives them a value above that which they might otherwise possess." *Wallace* v. *Hines, supra; Atlantic & Pacific Tea Co.* v. *Grosjean, supra.* The notion of organic unity, it has been said, is sometimes used as a means of "taxing property outside of the state under a pretense", and of unlawfully taxing a privilege or property outside of the State "under the name of enhanced value or good will". *Fargo* v. *Hart, supra.* This Court has observed, in the case of a unitary business, that "* * * the difficulty of making an exact apportionment is apparent" and that "* * * a method not intrinsically arbitrary will be sustained until *proof is offered* of an unreasonable and arbitrary application *in particular cases.*"

No prior decision of this Court supports the principle that a State may tax property beyond its borders. There is much to the contrary. The precedents are summarized in *Flint* v. *Stone Tracy Co.*, 220 U. S. 163, where it was said of a charter fee graded upon the entire capital stock of a foreign corporation engaged in commerce among the States and in commerce in other States that "looking through forms and reaching the substance of the thing * * * the tax thus imposed was in reality a tax upon * * * property beyond the limits of the State", and further "that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the Act in question was * * * to tax property beyond the jurisdiction of the State and * * * therefore invalid."

Granted a legislative purpose in the Act under review to lend enhanced value to intrastate property because of its relation to extra-state property and activities, the statute is still, upon the most elemental considerations, thoroughly arbitrary. Its clear and unmistakable effect is to allocate

to Texas all of petitioner's property to the extent that it is employed in producing articles of commerce sold *for the first time* in Texas—articles from which *no* gross receipts arise until they are sold intrastate in Texas. It cannot be that the value of the property in Texas is enhanced by exactly 100% of the value of all that is necessary to do what is done without the borders of the State. But as applied to petitioner this is the result of the statutory formula. Were petitioner to manufacture alone in Michigan and to sell alone in Texas, 100% of all petitioner's property both in Michigan and Texas would be allocated by the statutory formula to Texas alone. Thus the effect of the formula is to regard Texas as "the hub from which the spokes of the entire wheel radiate to the outer rim", and under it Texas refuses to lop off as foreign to Texas those elements of the business constituting a single unit which are in fact outside the confines of the State. This argument advanced by the Supreme Court of North Carolina in *Hans Rees' Sons* v. *North Carolina, supra,* was emphatically repudiated by this Court, saying "When * * * there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction".

As stated, were petitioner to manufacture solely in Michigan and sell solely in Texas, the statute would nevertheless allocate and attribute to Texas 100% of its entire manufacturing and selling activities. *Pro tanto,* under the facts alleged, that is the operation of the statute on petitioner. By the device of adopting the ratio of *gross receipts from* business done within Texas to gross receipts from all business wherever done, Texas draws to itself petitioner's en-

tire property and activities, both beyond and within the State, to the extent that those properties and that activity eventually culminate in intrastate sales. Were petitioner to operate through a Texas sales subsidiary, as some of its competitors, the matter would adjust itself. There would be receipts from Michigan manufacturing activities upon the sale and delivery by the manufacturing parent corporation to the Texas sales subsidiary. But this is not the case, and under petitioner's unitary corporate structure the entire weight of petitioner's far flung unitary activity is ascribed, under the statutory formula, to Texas, and the value of all property used therein is allocated by the statute in its entirety to Texas. The arbitrary quality of the statute, as applied to a manufacturing corporation such as petitioner, would seem obvious.

If the question be, as it is, one of apportionment, then the answer lies in the bare statement that apportionment is altogether wanting under the statute. It is no apportionment to allocate to Texas *all* of petitioner's property and activities which ultimately result in Texas sales, and to attribute to other States no part, however small, of this unitary property and activity.

Bass, Ratcliff & Gretton, Ltd. v. *Tax Comm.*, 266 U. S. 271, and *Underwood Typewriter Co.* v. *Chamberlin*, 254 U. S. 113, cited and discussed in the opinion, do not support the court's conclusions here. These cases are inapplicable *to the facts* plead in the petition, and admitted by respondents' demurrer.

In the *Underwood Typewriter* case, plaintiff contended that 47% of its net income was not reasonably attributable to the *manufacture* of products from the sale of which 80% of its gross earnings were derived. But in that case the plaintiff did not even attempt to show this, and the opinion states that for aught that appears, the percentage of net profits earned in Connecticut may have been much larger

than 47%, and concluded consequently there was nothing to show either that the *method of* apportionment was arbitrary on its face, or in its application to the Typewriter Company.

The *Bass, Ratcliff & Gretton* case is of entirely similar import. It was decided on the principles of the *Underwood Typewriter* case, and on the express statement that it was not shown, any more than in the *Underwood* case, that the application of the statutory method of apportionment had produced an unreasonable result.

How different here, where the legislative scheme is to measure the tax by "the actual capital of such corporation employed by it in its Texas business". *Staples* v. *Kirby Petroleum Co., supra*—"total gross assets employed by the corporation in the transaction of its business in Texas", *Investment Securities Co. of Texas* v. *Meharg, supra*—, and the result of the statutory formula is so far short of apportionment, in any degree, that it allocates to Texas as property employed in Texas the entire total of petitioner's extra-state capital and assets to the full extent that those extra-state properties and activities result ultimately in gross receipts from Texas sales.

What the court has done, by its opinion, is to say that one State may tax a corporation upon its entire capital devoted to a unitary activity, consisting of manufacturing, assembly and sales functions, even though that property lies in part beyond the State and is devoted in part entirely to activities conducted beyond the State. We say this because it would take but a reverse application of judicial reasoning to support a Michigan statute which would attribute to Michigan all the value of petitioner's Texas property used in its assembly and sales functions, conducted entirely in Texas.

National Leather Co. v. *Massachusetts*, 277 U. S. 413, is not in point. The case holds only that the ownership of

physical assets present in a State, the title to which is in a subsidiary corporation, may be attributed, for purposes of measuring a privilege tax, to the parent company, and thus that the corporate fiction may be disregarded in determining the ownership of the property of the subsidiary corporation. It is not thought that *National Leather Co.* v. *Massachusetts, supra*, touches upon the question of reasonable apportionment.

International Shoe Co. v. *Shartel*, 279 U. S. 429, and *New York* v. *Latrobe*, 279 U. S. 421, cited in the Court's opinion, it seems to us; are of no help here. Neither involves a question of apportionment. The holding in each is limited to the right of a State to value non-par stock arbitrarily for franchise tax purposes. This was said to affect only the rate of tax. But the Court in those cases was careful to distinguish the taxes involved in such cases as *Airway Elec. Appliance Corp.* v. *Day*, 266 U. S. 71; *Looney* v. *Crane, supra*, and *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, "which either were measured by authorized instead of issued capital stock, or were not limited to the part of the capital stock *justly apportioned to the taxing state.*"

The Court holds that in determining the value of an intrastate privilege, weight may be given to property beyond State boundaries in recognition of the very real effect of this property upon the value of the local privilege. This, of course, is the principle announced in *Atlantic & Pacific Tea Co.* v. *Grosjean, supra*. The principle is not new. Granting the soundness of the Court's decision in *Tax Commissioners* v. *Jackson*, 283 U. S. 527, it cannot logically be contended that State boundaries insulate against the application of those principles. But here the case is different. The legislative scheme, as the Court holds, is to base the tax *upon capital employed in Texas.* It is specifically and repeatedly alleged in the petition that of petitioner's capital, only approximately $3,000,000 is employed

in Texas. This the State admits by its demurrer, but the Court, in the face of the admitted allegations, sustains a statute which by arbitrary legislative fiat classifies as property employed in Texas some $20,000,000 of petitioner's property not actually located in Texas, but situated and actually used in petitioner's manufacturing operations wholly foreign to its Texas assembly and sales functions. This, it is submitted, is unsupportable both in fact and in theory.

The statutory allocation is without appeal to the intelligence. Under it, as is shown by the tabulation appended at page 5 of petitioner's reply brief, a $200,000,000 corporation, doing slightly less than $8,000,000 of Texas business, is required to pay the same tax as a corporation of precisely similar capital, doing slightly less than $40,000,000 of Texas business, the differentiating factor in the two instances lying solely in the amount of extra-state business done by the two companies. Viewed as a tax related to gross receipts from Texas operations, the statute is fantastic. Similarly, viewed as a tax upon capital employed in Texas operations, the statute, which allocates to Texas 100% of the property and activities of a manufacturing corporation such as petitioner, to the extent that this property and activity ultimately result in Texas sales, is irrational, arbitrary and capricious. If, as in the past, it is the function of the Court to look through form to the substance of things, the case at bar abundantly justifies the exercise of the function here.

We have no disagreement with the statement that the Constitution recognizes the dual interests of the State and National Governments, and permits a tax by local government upon intrastate activities of far-flung enterprises, protected by the commerce clause. However, this is not to say that a tax on a local franchise must not bear some reasonable relation to the privilege granted. Subject to this lim-

itation, State legislatures may select any appropriate measure of taxation. Here, the measure selected is capital employed in the Texas business, and the tax may properly be measured in any intelligent fashion by that factor. But State power under the national constitution may not be made the means of placing an exaction upon a privilege granted by another State, nor of exacting a levy on property employed solely in the exercise of privileges granted by other States. The right to tax what lies within and what is done within its own borders inheres in each State, and freedom from interference with this right is sacred to each jurisdiction. If these principles still obtain, how can it be that this Texas statute is fair and reasonable, and results only in a just apportionment of extra-state property to Texas when, however viewed, it allocates to Texas an overwhelmingly disproportionate part of petitioner's manufacturing capital located and held in other States and used in the exercise of privileges conferred by other States? If the Court's opinion is to stand, then, in fact, the values upon which the tax is computed are represented in capital actually employed in business wholly outside of and foreign to Texas, and through some process of judicial reasoning petitioner's capital employed solely in Michigan manufacturing activity has been found to be employed in Texas.

We direct attention to the court's reference to the ability of managers of corporate business to employ financial power, inherent in the possession of assets, with flexibility at whatever point, within or without the State, the managers may determine. In the light of the scheme of taxation, these remarks are inapplicable to the case at bar. The statute measures the annual franchise tax entirely in relation to the corporate status and corporate business during its fiscal year *next preceding* that for which the tax is exacted. In other words, the legislative scheme has no regard for what the managers may do with the corporation's assets

during the year for which the tax is paid. On the contrary, the State looks entirely to what *was done* with these assets, and the results obtained in the corporate enterprise *during the next preceding fiscal year*. By Article 7089, Revised Statutes of Texas, 1925, corporations subject to annual franchise taxes are required to make a sworn report showing the condition of the corporation on the last day of the preceding fiscal year. In the report the corporation must state the cash value of its gross assets, the amount of its capital stock, capital stock actually subscribed, and the amount paid in, the surplus and undivided profits or deficit, if any, the amount of its mortgage and current indebtedness, its total gross receipts from all sources, and its gross receipts from Texas business and various other data for the *fiscal year preceding*. Franchise taxes for the year next succeeding are calculated upon this data. Looking then to the express statutory scheme, there is no room to consider what the corporate managers may do with corporate capital not used within the State during its next preceding fiscal year. There is no justification for the court disregarding the legislative scheme and justifying the tax on the possibility that extra-state financial power and capital may be used during the year for which the annual tax is paid, when the legislature has not concerned itself with these possibilities. In all events, so long as particular financial power and capital is employed by corporations outside a given State, then a franchise tax levied by such State, based upon that capital employed beyond its borders, is improper and cannot be said to bear any reasonable relation to the local privilege.

To support the statute, the court presumes petitioner's property beyond the State boundaries to be of very real effect upon the value of the local privilege. Even if these considerations could be said to be appropriate to a differ-

ent taxing scheme, and to taxpayers differently situated, they are without application to the case at bar. If facts were pleaded, or evidence proved, to establish that petitioner's property outside of Texas adds to the value of the Texas privilege, the case would be different. But here petitioner pleads, and respondents by their demurrer admit, that none of petitioner's some $20,000,000 of extra-state property, allocated by the statute to Texas, is held, located or used in Texas: On the record, has not the court gone far afield by some process of judicial notice in finding, in the face of the admitted facts, that this extra-state property is actually employed within the State? If the court will refer to the exhibits shown at pp. 20B and 21 of the Record, it will be seen at a glance that of this $20,000,000 of allocated capital, slightly in excess of $18,000,000 is actually located in Michigan, and consists in part of such items of property as land, buildings, blast furnaces, coke ovens, open hearth furnaces, and steel mills. It is inconceivable that this property is employed in Texas where petitioner's sole activity consists in the assembly and sale of motor cars, and in the sale of parts therefor.

The court says: "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." If this statement be accepted at face value, the court is announcing a new principle of constitutional law at war with what has heretofore been considered well settled. Prior cases draw a distinction between the right of a State to tax domestic corporations which take their existence from the taxing State, and the right of a State to tax foreign corporations enjoying at the hands of the State only a local privilege. In the case of the former, it has been held that property wherever situated may be regarded in levying franchise

taxes, *Kansas City, etc. R. R.* v. *Stiles, supra, Kansas City, etc. Ry. Co.* v. *Kansas*, 240 U. S. 277. But in the case of the latter, local government has been limited in the measure of taxation to that property and those activities which relate to the value of the local privilege. *Western Union* v. *Kansas, supra, Looney* v. *Crane, supra.*

It is difficult to know whether the Court has supported the Texas tax on the theory that the property in Michigan and other States is actually employed in Texas, or on the theory that whether employed in Texas or not, this property may be used by Texas as a basis for taxation. If the ruling is Texas may base its tax on property neither located nor employed in Texas, then the Court has rejected precedent of many years standing. It is unlikely, we think, the Court would do this without discussion of prior decided cases, and we therefore assume that the sole basis of decision is that approximately $20,000,000 of petitioner's capital alleged to be located and used entirely without the State is, petitioner's allegations to the contrary notwithstanding, held in legal effect to be actually employed in Texas business. This holding we believe incorrect on the self-evident proposition that steel mills, coke ovens, blast furnaces, land, buildings, etc., located in Michigan and devoted exclusively to Michigan manufacturing operations, cannot be said to be employed in petitioner's Texas business, which consists solely in the assembly of manufactured parts into motor vehicles, and the sale of such motor vehicles and parts therefor.

Conclusion

Petitioner urgently and respectfully solicits a re-examination of its contentions. The principles involved are of widespread effect and importance, and deserve the Court's fullest consideration before being finally decided.

Wherefore, petitioner prays that it be granted a rehearing herein, and that the judgment of affirmance heretofore

rendered be set aside, and that the judgments of the District Court and of the Circuit Court of Appeals be reversed, and that petitioner be granted such relief as may be appropriate in the premises.

Respectfully submitted,

FORD MOTOR COMPANY,
By GAIUS G. GANNON,
Attorney for Petitioner.

Certificate of Counsel

I, Gaius G. Gannon, of Counsel for Petitioner Ford Motor Company, hereby certify that the foregoing Motion for a Rehearing is presented in good faith and not for delay.

GAIUS G. GANNON.

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1939.

Ford Motor Company, Petitioner, vs. Tom L. Beauchamp, Secretary of State of the State of Texas, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 11, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The question for determination in this proceeding is the validity, as applied to this petitioner, of a statute of the State of Texas levying an annual franchise tax on all corporations chartered or authorized to do business in Texas, measured by a graduated charge upon such proportion of the outstanding capital stock, surplus and undivided profits of the corporation, plus its long term obligations, as the gross receipts of its Texas business bear to the total gross receipts from its entire business.

The Court of Appeals[1] affirmed the judgment of the District Court, upholding the validity of the tax. On account of an alleged probable conflict with the principles underlying certain decisions of this Court certiorari was granted.[2] The applicable provisions of the statute appear below.[3]

By Article 7057b of the Revised Civil Statutes of Texas any corporation which may be required to pay any franchise or other privilege tax may pay it under written protest and bring suit within a limited time thereafter in any court of competent jurisdiction in Travis County, Texas, against the public official charged

[1] Ford Motor Co. v. Clark, 100 F. (2d) 515.

[2] 306 U. S. 628.

[3] "Article 7084. Amount of Tax.—(A) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, . . . each year, pay . . . a franchise tax . . . , based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rates for each One Thousand Dollars ($1,000.00) or fractional part thereof; One Dollar ($1.00) to One Million Dollars ($1,000,000.00), sixty cents (60¢) . . . "

with the duty of collecting such tax, the State Treasurer and the Attorney General, for its recovery. This suit was instituted in the District Court of the United States, Western District, Austin Division, against the state officials authorized to be made defendants. Defendants joined in a demurrer on the ground that no cause of action was set out in the petition.

Petitioner owns and operates a large manufactory of motor vehicles in Michigan and assembly plants in Texas. No parts for the automobiles produced by petitioner are manufactured at any point within Texas. The manufactured parts are shipped to petitioner's assembly plants in Texas and are there assembled. The assembled vehicles are sold in intrastate commerce to various dealers who in turn sell the vehicles to the public. A relatively small number of completed vehicles are shipped into Texas and later sold in intrastate commerce along with large quantities of motor parts and accessories. Without undertaking to be precise, the gross receipts from business done in Texas for the year in question amounted to approximately $34,000,000. Petitioner's total gross receipts were about $888,000,000. The ratio of Texas receipts to total receipts was 3.85+ per cent. Petitioner's total taxable capital was $600,000,000+. The value of all assets located in Texas was somewhat over $3,000,000, while the value of the capital allocated to Texas as a base for taxation by the statutory formula would be in excess of $23,000,000.

For the taxable year beginning May 1, 1936, a franchise tax was tendered Texas in the sum of $1,224, computed on the actual net book value of all of petitioner's assets in Texas. On demand and under protest an additional franchise tax and penalty was paid in the sum of $7,529, based on the allocation to Texas of capital as calculated by the statutory formula. This suit was brought to recover the alleged unlawful exaction.

This exaction, petitioner pleads, is calculated from a formula that results in the levy of a tax on assets used in petitioner's interstate business in violation of Article I, Section 8, of the Constitution. It is further alleged that the tax operates to deprive petitioner of its property without due process of law in violation of the Fourteenth Amendment because it must pay a tax on property neither located nor used within the State of Texas and on activities beyond the borders of Texas.

The statute calls the excise a franchise tax. It is obviously payment for the privilege of carrying on business in Texas.[4] There is no question but that the State has the power to make a charge against domestic or foreign corporations for the opportunity to transact this intrastate business.[5] The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated.

The motor vehicles for the marketing of which the privilege is used are concededly sold in intrastate commerce. The tax here levied is not for the privilege of engaging in any transaction across state lines or activity carried on in another state. It is much like that upheld in *Bass, Ratcliff & Gretton, Limited*, v. *Tax Commission*.[6] In that case a tax was laid for the privilege of doing business in New York determined, for corporations which did not transact all their business within that state, by a percentage of that part of the net income which is calculated by the proportion which the aggregate of specified classes of property within the state bears to all the property of the corporation.[7]

In *National Leather Company* v. *Massachusetts*[8] this Court upheld a tax for the privilege of doing business in a state by a corporation of an amount "equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth." This excess was defined as "such proportion of the fair cash value of all the shares constituting the capital stock . . . as the value of the assets, both real and personal, employed in any business within the commonwealth . . . bears to the value of the total

[4] Investment Securities Co. v. Meharg, 115 Texas 441; United North & South Development Co. v. Heath, 78 S. W. (2d) 650 (Tex. Civ. App.).

[5] Ficklen v. Shelby County Taxing District, 145 U. S. 1, 21; American Mfg. Co. v. St. Louis, 250 U. S. 459; Matson Nav. Co. v. State Board, 297 U. S. 441; Western Live Stock v. Bureau, 303 U. S. 250; Coverdale v. Pipe Line Co., 303 U. S. 604, 608.

[6] 266 U. S. 271.

[7] Cf. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120.

[8] 277 U. S. 413.

assets of the corporation." The National Leather Company, a Maine corporation, owned the stock of two other Maine corporations. Their plants were in Massachusetts. On the assumption that the situs of the stock followed the domicile of the owner, the taxpayer challenged the inclusion of the Maine stock in the basis for the local tax. This Court held that Massachusetts was free to use the stock for the calculation of the local tax. Similar methods of determining privilege taxes were left to the states in *International Shoe Company* v. *Shartel*[9] and *New York* v. *Latrobe*.[10] The Constitution recognizes the dual interests of the national and state governments and permits taxes for local privileges upon the intrastate activities of the farflung enterprises which gain large benefits from the nationwide market, protected by the commerce clause. We reject petitioner's contention that constitutionality of state taxation turns on so narrow an issue as whether local assets rather than local gross receipts are used in a taxing formula.

In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located.[11] The weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state. This was recognized by this Court in *Atlantic & Pacific Tea Company* v. *Grosjean*[12] where an occupation or license tax on chain stores was graduated "on the number of stores or mercantile establishments" included under the same management "whether operated in this State or not." We said: "The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the

[9] 279 U. S. 429.

[10] 279 U. S. 421.

[11] Atlantic Refining Co. v. Virginia, 302 U. S. 22, 29; cf. Kansas City, Fort Scott & Memphis Ry. v. Botkin, 240 U. S. 227, 235.

[12] 301 U. S. 412, 424-425.

whole organization, but in their setting as integral parts of a much larger organization."[13] This same rule applies here. *James* v. *Dravo Contracting Company*[14] contains nothing contrary to this view. The statute under consideration there levied a privilege tax "equal to two per cent of the gross income of the business." In so far as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute.

Affirmed.

Mr. Justice McREYNOLDS is of opinion that the judgment complained of should be reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[13] 301 U. S. 425.

[14] 302 U. S. 134, 139.